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"The People" of the Second Amendment: Citizenship and the Right to Bear Arms

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"THE PEOPLE" OF THE SECOND AMENDMENT: CITIZENSHIP AND THE RIGHT TO BEAR ARMS

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The Supreme Court's recent Second Amendment decision, District of Columbia v. Heller, *asserts that the Constitution's right to bear arms is an individual right to armed self-defense held by law-abiding "citizens." This Article examines the implications of this description, concluding that the Second Amendment cannot concurrently be a right of armed self-defense and restricted to citizens. The Article proceeds in three parts. First, it analyzes the term "the people" as it has been interpreted in recent Court cases. The Article concludes that constitutional text and Supreme Court jurisprudence provide no sustainable basis to believe the Second Amendment is limited to citizens. Second, the Article situates* Heller *within a historical context of gun regulation motivated by racial animus and xenophobia, manifested by contractions of citizenship to exclude—and gun laws intended to disarm—racial minorities and noncitizens. Third, the Article attempts to revive a coherent theory justifying the limitation of gun rights to citizens but ultimately concludes that armed self-defense is conceptually unrelated to historically political rights such as voting and jury service. Thus,* Heller*'s holding regarding who is entitled to armed self-defense is logically unsound and doctrinally troubling.*

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INTRODUCTION

The gun, its availability to the civilian population,[1] its use for both public and private ends,[2] and the violence associated with it,[3] are uniquely American. In its recent ruling in *District of Columbia v. Heller*, the Supreme Court reaffirmed the centrality of firearms to American civil and political identity.[4] Opining that the right to bear arms is an individual right, the Court struck down a Washington, D.C., handgun law that virtually banned handgun possession. In doing so, the Court constitutionalized a right to armed self-defense.[5]

While this Article does not directly engage the persuasiveness *vel non* of the individual rights view endorsed by *Heller*, it explores the significance of the majority's articulation of the subset of individuals to whom the right inures. Although the Second Amendment reads as a protection of the right of "the people to keep and bear Arms,"[6] Justice Scalia's majority opinion refers to the protected class as "law-abiding citizens"[7] and further clarifies that "the people" refers to

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[1] *See Factbox: Guns and Gun Ownership in the United States*, REUTERS, Apr. 17, 2007, *available at* http://www.reuters.com/assets/print?aid=USN1743414020070417 (detailing that estimated 34% of U.S. citizens own guns and over 200 million guns are in private hands).

[2] Richard Slotkin, *Equalizers: The Cult of the Colt in American Culture*, *in* GUNS, CRIME, AND PUNISHMENT IN AMERICA 54, 55 (Bernard E. Harcourt ed., 2003) ("The difference between the United States and Europe is that our culture grants a far broader license to private individuals to use violence for private ends.").

[3] Robert Weisberg, *Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime*, 39 HOUS. L. REV. 1, 10–11 (2002) ("[A]mong 'peer' nations [the United States] is exceptional for having the highest homicide rate. . . . [W]e are probably exceptional in terms of the number of guns in private hands.").

[4] 128 S. Ct. 2783 (2008) (holding that Second Amendment protects individual right to possess firearms and striking down District of Columbia's handgun regulation).

[5] *Id.* at 2818 ("Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."); *see also* McDonald v. City of Chicago, No. 08-1521, slip op. at 19 (U.S. June 28, 2010) ("Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right." (footnote omitted)).

[6] U.S. CONST. amend. II ("A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

[7] *Heller*, 128 S. Ct. at 2816; *id.* at 2821 ("[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.").

"members of the political community."[8] Thus, in one motion, *Heller* both constitutionalizes self-defense and limits it to a particular subset of persons within the country's territorial boundary.[9] In so holding, *Heller* interjects itself into a long, complicated relationship between citizenship and gun rights.

Currently, federal law bans firearm possession by temporary immigrants[10] and the undocumented,[11] and firearm offenses are amongst the crimes that can lead to the deportation of legal permanent residents.[12] The several states have varying prohibitions on

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[8] *Id.* at 2790.

[9] *See* Akhil Reed Amar, Heller, *HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 165–66, 187–88 (2008) (comparing various Justices' interpretations of words 'people' and 'militia' as used in Second Amendment in their opinions in *Heller*); Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. REV. 195, 247 (2009) ("Now in the Supreme Court's sole examination of the Second Amendment, the Court speaks of it as a right of citizens.").

[10] The Immigration and Nationality Act, codified in Title 8 of the United States Code, delineates several classes of persons: citizens, legal permanent residents, nonimmigrants, and persons who are unlawfully present. *See, e.g.*, 8 U.S.C. § 1101(a)(3) (2006) (defining "alien"); *id.* § 1101(a)(15) (defining "immigrant"); *id.* § 1101(a)(20) (defining "lawfully admitted for permanent residence" status); *id.* § 1101(a)(26) (discussing eligible "non-immigrant[s]"). Throughout this article, I use the general term noncitizens to apply to any person who is not a citizen of the United States. The term "temporary immigrant" may be used to refer to nonimmigrants, who are persons permitted in the United States for temporary residence.

[11] Please note that whenever possible, I will use the term "undocumented immigrants" or "undocumented persons" to refer to those commonly referred to as "illegal aliens." I am cognizant of the pejorative implications of the term "alien," which emphasizes the assumed foreignness and difference of otherwise law-abiding persons living in the United States. *See* Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 303 (1977) ("With regard to the possible stigmatizing effect of the classification, the aliens' claim is a good deal stronger. The very word, 'alien,' calls to mind someone strange and out of place, and it has often been used in a distinctly pejorative way."). Moreover, undocumented presence is not necessarily a criminal violation, and determinations of unlawfulness generally require adjudication after evidentiary presentment and consideration of exceptions to unlawful presence by an immigration judge. *See* 8 U.S.C. § 1182(a) (2006) (defining "[c]lasses of aliens ineligible for visas or admission"); *id.* § 1182(a)(6)(A)(i) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."); *id.* § 1229(a) (detailing procedure for initiating removal through service of written notice to appear); *id.* § 1229b(b) (defining eligibility for cancellation of removal and adjustment of status for "certain nonpermanent residents"); *id.* § 1253(a)(3) (permitting suspension of penalty for failure to depart under certain circumstances); Padilla v. Kentucky, 130 S. Ct. 1473, 1488–89 (2010) (Alito, J., concurring) (discussing complexities in determining whether any particular noncitizen is removable); State v. Martinez, 165 P.3d 1050, 1057 (Kan. Ct. App. 2007) (noting that ongoing presence in United States is not crime for individual without authorization who has not been previously deported).

[12] 18 U.S.C. § 922 (2006); *see also* Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891, 894–96 (2007) (summarizing restrictions on "alien" gun ownership).

noncitizen possession and use.[13] However, immigrants seeking naturalization must swear to bear arms on behalf of the nation if necessary before obtaining citizenship[14] and are rewarded with a faster path to citizenship if they enlist on behalf of the United States.[15] So while federal and state policies bar or regulate noncitizen firearm possession in several ways, they also incentivize and encourage it in specific and important instances. In short, there is no clear background rule or practice with regard to firearm possession by noncitizens.

This Article examines the historical, constitutional, statutory, and political relationship between firearms and citizenship. To provide a comprehensive analysis of citizenship and firearms, including state and federal laws, this Article will explore the link between guns and citizenship as both an historical and legal narrative and a doctrinal and theoretical conundrum. It argues that, although the Second Amendment's text provides no basis for limiting arms bearing to citizens, states and the federal government have restricted noncitizen possession throughout the nation's history to maintain racial and citizenship-based supremacy. Against this backdrop, and in comparison to other rights associated with citizenship, the right of armed self-defense posited by *Heller* cannot coexist with the restriction of "the people" of the Second Amendment to citizens.

This Article will highlight the link between arms regulation and those individuals considered lesser members of the American polity. In a telling passage from his seminal article on the Second Amendment, Professor Sanford Levinson writes "[t]here is strong evidence that 'militia' [as used in the Second Amendment] refers to all of the people, *or at least all of those treated as full citizens of the community*."[16] His discomfort with an unqualified reference to "all people" or even "all citizens" is indicative of the ambiguities and hypocrisies inherent in the field. For example, colonial American law ensured that even many free blacks were kept disarmed.[17] Similarly, black soldiers returning from the Civil War[18] and from World War I were disarmed

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[13] Gulasekaram, *supra* note 12, at 895 & nn.11–14.

[14] 8 U.S.C. § 1448(a) (2006) (establishing elements of naturalization oath).

[15] 8 U.S.C. § 1439(a) (2006) (setting out requirements for acquiring naturalization through service in armed forces).

[16] Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 646–47 (1989) (emphasis added).

[17] *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 332 (1991) ("The racial restriction in the [Uniform Militia Act of 1792] indicates the unrest the revolutionary generation felt toward arming blacks and perhaps the recognition that one of the functions of the militia would indeed be to put down slave revolts.").

[18] McDonald v. City of Chicago, No. 08-1521, slip op. at 23 (U.S. June 28, 2010) ("After the Civil War, many of the over 180,000 African Americans who served in the Union Army

and treated with disdain at home.[19] Increased immigration in the late nineteenth century also spurred state efforts to take guns away from aliens.[20] More recently, substantial gun control legislation coincidentally appeared at the same time as significant immigration and minority rights movements.[21] Media reports highlighted the Korean roots of the Virginia Tech killer, Seung-Hui Cho,[22] but his ability to easily procure firearms was rooted in Virginia law.[23] Confronted with a perceived uncontrollable influx of immigrants from Mexico, the Minutemen, a perversion of revolutionary militias, stand armed guard along the country's southern border.[24] Even while noncitizens bear arms for the country in Iraq and Afghanistan,[25] they can be prohibited from working domestically as police officers.[26] The Second Amendment remains a common thread throughout history, weaving its way through citizens and noncitizens, whites and nonwhites, to

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returned to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks.")

19 *See* F. Michael Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 WM. & MARY BILL RTS. J. 273, 290 (2000) (discussing postwar incidents where whites stripped returning black veterans of their uniforms).

20 *See infra* Part II.B (arguing that increased presence of immigrants from Asian and southern and eastern European countries spurred significant noncitizen gun regulation).

21 *See* Franklin E. Zimring, *Continuity and Change in the American Gun Debate*, *in* GUNS, CRIME, AND PUNISHMENT IN AMERICA, *supra* note 2, at 29, 30 (noting that significant federal gun legislation gained traction in mid-to-late 1960s in wake of civil rights movement and urban unrest).

22 Michelle Tsai, *Cho Seung-Hui or Seung-Hui Cho? How the Media Chose a Name for the Virginia Tech Gunman*, SLATE (Apr. 19, 2007), http://www.slate.com/id/2164659 ("The Asian version of the name—Cho Seung-Hui—appeared to be more widespread, in part because of its use in the ubiquitous wire stories from Reuters and the AP. As a result, some Korean-Americans felt media groups were playing up Cho's foreign-ness . . . ."); Media Advisory, Asian American Journalists Ass'n, Continuing Coverage of Virginia Tech Shooting (Apr. 17, 2007), *available at* http://www.aaja.org/news/aajanews/2007_04_16_01/2007_04_17_01/ ("Now that the identity of the suspected shooter at Virginia Tech is known, AAJA cautions the use of his heritage or immigrant status in news coverage.").

23 Virginia is regarded as one of the easiest states in which to buy a firearm. *See* BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, 2009 BRADY CAMPAIGN STATE SCORECARD (2009), http://www.bradycampaign.org/xshare/bcam/stategunlaws/scorecard/BradyScorecard.pdf [hereinafter BRADY CAMPAIGN SCORECARD] (ranking Virginia seventeen out of one hundred points total for strength of gun laws).

24 *See* David Holthouse, S. Poverty Law Ctr., *Nativists to 'Patriots,'* *in* THE SECOND WAVE: RETURN OF THE MILITIAS 11, 11 (2009), http://www.splcenter.org/sites/default/files/downloads/The_Second_Wave.pdf (describing "sizable Minuteman border vigilante compound" just north of Mexico).

25 *See* Charles E. Roh, Jr. & Frank K. Upham, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INT'L L.J. 501, 501–02 (1972) (discussing military's willingness to draft and employ noncitizens).

26 *See, e.g.*, Foley v. Connelie, 435 U.S. 291, 299–300 (1978) (upholding New York prohibition of noncitizens serving as state troopers).

form a unique and paradoxical narrative of firearm regulation in America.

By focusing on the relationship between national identity and firearms, this Article does not take a stand on the traditional debates that dominate right-to-bear-arms scholarship.[27] It takes the Supreme Court's declaration in *Heller* as the definitive word on the subject and instead attempts to determine the significance of the individualized self-defense view for citizens and noncitizens.[28] Neither will this Article proffer a comprehensive assessment of the judicial methodology used to understand state and federal laws that condition gun ownership and use on citizenship status.[29]

Instead, this Article enters at the nexus of citizenship literature and right-to-bear-arms scholarship. It ultimately concludes that (1) the United States has a long history of restricting gun ownership by non-

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[27] These debates include the individual-versus-collective-rights debate, the sophisticated collective rights view, and concerns about the viability of the "standard model" of Second Amendment interpretation. *See, e.g.*, Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221 (1999) (arguing that those believing in "Standard Model" of Second Amendment interpretation, which supports an individual right to bear arms, use historical support without context and therefore misread historical record); Levinson, *supra* note 16 (arguing that collective interpretations of Second Amendment are in tension with individualized interpretation of rights protected by other Bill of Rights provisions); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 723 N.Y.U. L. REV. 831 (1998) (rejecting claim that Second Amendment is "outdated" and arguing that constitutional rights cannot be dependent upon courts' understanding of contemporary values); David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879 (1996) (examining the militia movement's interpretation of "the people" of Second Amendment but arguing that no such united "people" currently exists); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000) (arguing that historical evidence supports collective understanding of right to bear arms); *see also* Klukowski, *supra* note 9, at 199–200 (summarizing viewpoints).

[28] Because of the politicized and sensational nature of the gun debate in American culture, *see* John M. Bruce & Clyde Wilcox, *Introduction* to THE CHANGING POLITICS OF GUN CONTROL 1, 1–6 (John M. Bruce & Clyde Wilcox eds., 1998) (discussing gun debate, political groups involved, and their recent reactions to major events), I feel compelled to state clearly that I firmly support gun regulation at all levels of government, if applied equally. *See generally* Gulasekaram, *supra* note 12 (arguing for equal protection of rights for noncitizens). I wish to make it clear that while my analysis of noncitizen gun possession or dispossession may be hijacked by interest groups intent on dismantling governmental control over firearms, neither my research nor my personal convictions are beholden to any association promoting increased gun possession and decreased regulation.

[29] I have conducted such a survey in a prior article, *Aliens with Guns: Federal Power, Equal Protection, and the Second Amendment*, arguing there that citizenship distinctions in firearms laws provide a unique opportunity to reassess the Supreme Court's alienage jurisprudence and concluding that a modified equal protection framework is best suited for evaluating governmental action affecting noncitizens. Gulasekaram, *supra* note 12, at 898 (suggesting that federal and state authorities should be able to assert national security and "gate-keeping" concerns as justifications for alienage firearms restrictions).

American "others," including noncitizens, especially when citizenship is racially defined; (2) citizenship restrictions in gun laws make little sense in light of *Heller*'s understanding of the Second Amendment as a self-defense right and, further, do not comport with other rights reserved solely for citizens; and (3) no other logical analysis or judicial precedent justifies such restrictions. Thus, *Heller*'s allusion to citizens needs to be reconsidered in light of this newly enshrined constitutional right to self-defense.

Part I analyzes *Heller*'s limitation of the meaning of "the people" in the Second Amendment to citizens in light of precedent discussing the appropriate methodology for defining constitutional language which establishes who is entitled to particular privileges and rights. Concluding that such a limitation is doctrinally unsound, Part II situates *Heller*'s alienage restriction within a historical narrative of firearms regulation and citizenship status. Here, the Article showcases the ways in which citizenship restrictions in the firearms context have operated as a proxy for racial discrimination, helped construct sinister versions of the foreign "other" unfit to wield arms, and contributed to the indeterminacy of citizenship's content. Buttressing the conclusions reached in Parts I and II, Part III explores whether *Heller*'s citizenship limitations can be saved by analyzing and defining when gun rights comport with theories underlying "citizenship rights" or rights the judiciary has interpreted as being guaranteed only to citizens. By exploring other rights limited to citizens, such as voting and jury service, this Article argues that the phrase "the people" of the Second Amendment cannot be limited to citizens, except through interpretations at odds with an individualized, self defense–related conception of arms bearing. Since *Heller*'s restriction of "the people" to citizens has no basis in precedent that interprets constitutional language or that defines citizenship rights, it should be reconsidered, particularly in light of the historical correlation among xenophobia, racism, and restrictions on access to firearms.

I
WHO ARE "THE PEOPLE"?

Assessing various models of interpretation, the historian Saul Cornell commented that the "question of who exactly were 'the people' was not only central to the meaning of the Second Amendment but was also at the heart of the debate between Federalists and Antifederalists during ratification."[30] For Cornell's purposes, deciphering the meaning of "the people" is essential to

[30] Cornell, *supra* note 27, at 234.

unlocking the collective versus individual or private versus public debates that dominate Second Amendment scholarship.[31] Here, however, I use his observation to ask a different question: Post-*Heller*, does "the people" refer to anyone within the territorial jurisdiction of the United States, or is it limited to a smaller subset, such as a select group of U.S. citizens? As the phrase "the people" appears multiple places in the Constitution, the question has significant implications.

Here, this Article will attempt to reconcile the language of *Heller* with constitutional text and prior Supreme Court opinions that have attempted to delineate the contours of those covered in the phrase "the people." Part I.A concludes that the *Heller* majority's restrictive definition of "the people" is implausible given its self-defense reading of the right to bear arms. Moreover, given the consistency of anti-immigrant fear and the persistence of noncitizen gun regulation, *Heller*'s self-defense rationale fails to explain present day unequal limitations on noncitizen possession.[32] Part I.B then takes up the Second Amendment's incorporation against the states, noting that the fact and methodology of incorporation raise the stakes for the inclusion of noncitizens within the ambit of the Second Amendment.

A. Citizens in the Constitution, Verdugo-Urquidez, *and* Heller

In its landmark case *Heller v. District of Columbia*, the Supreme Court, after nearly seventy years of avoiding cases squarely presenting Second Amendment questions, ruled that the right to bear arms protected by the Federal Constitution was held by individuals regardless of whether they were acting as part of a militia or in a military capacity.[33] In doing so, the majority opinion focused on the idea of gun use for self-defense, rather than for armed rebellion or protection of state, opining, "the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose."[34] Commentary on *Heller*

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[31] *Id.* at 234–37; *see also* Williams, *supra* note 27, at 908–09 ("The Second Amendment, in other words, conjures with the idea of a People: [I]t simply presumes that a People exists, because that presumption is necessary for the provision to make sense in its own terms. It does not, however, seriously examine whether a People actually does exist in America.").

[32] *See* Gulasekaram, *supra* note 12, at 895 & nn.11–14 (discussing state statutes that condition gun possession or use on citizenship).

[33] 128 S. Ct. 2783, 2793 (2008).

[34] *Id.* at 2817.

has focused on this recognition of a personal right and on the opinion's constitutionalization of armed self-defense.[35]

In *Heller*, the Court invalidated a District of Columbia law that prohibited handguns and required that lawfully owned firearms be kept unloaded and disassembled. To do so, the Court relied on a few important interpretative conclusions. First, it held that the Second Amendment's "prefatory" clause ("A well regulated Militia, being necessary to the security of a Free State") does not limit its subsequent clause ("the right of the people to keep and bear Arms, shall not be infringed.").[36] Second, it held that within the second clause, the phrase "the people," referred to "all members of the political community," and not solely those participating in an organized militia.[37] Third, it held that the terminology "keep and bear arms" did not limit gun possession to military usage.[38] Finally, synthesizing these interpretative steps, the opinion concluded that the Amendment guarantees an individual right to possess firearms for the purpose of self-defense.[39] Therefore, the District of Columbia's prohibition of an entire class of arms used overwhelmingly by individuals for home and personal protection ran afoul of the Constitution.[40]

Based on that ruling, gun advocates at both the federal and state levels have challenged a number of existing regulations[41] and concurrently advanced legislation to permit possession of firearms in national parks, local restaurants, and other public places.[42] Their fundamental argument is that an individual, constitutional right to self-

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35 *See, e.g.*, Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246 (2008) (arguing that *Heller* reflects emerging national consensus around Second Amendment's protection of individual right); Adam Winkler, *The New Second Amendment: A Bark Worse Than Its Right*, HUFFINGTON POST (Jan. 2, 2009), http://www.huffingtonpost.com/adam-winkler/the-new-second-amendment_b_154783.html (noting that legal scholars predicted "tidal wave" of challenges to gun control based on Court's protection of "individual's right to own guns for personal self-defense").

36 U.S. CONST. amend. II; *see also Heller*, 128 S. Ct. at 2801 ("The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right . . . .").

37 128 S. Ct. at 2788–91.

38 *Id.* at 2791–97.

39 *Id.* at 2816–17.

40 *Id.* at 2817–22.

41 *See* Winkler, *supra* note 35 (discussing results of lower court challenges to regulations based on *Heller*).

42 Kirk Johnson, *Working out the Details of Guns in National Parks*, N.Y. TIMES, May 27, 2009, at A12 (describing federal law that allows firearm possession in national parks and wildlife refuges); Katharine Q. Seelye, *Tennessee Expands Gun Rights*, N.Y. TIMES (June 15, 2009), http://www.nytimes.com/2009/06/16/us/16tennessee.html (describing Tennessee's newly passed gun laws allowing possession in state parks, restaurants, bars, and vehicles).

defense justifies possession in these locations without significant governmental interference.

Significantly, the Court need not have ruled on the nature of the right protected by the Amendment to reach its conclusion that the D.C. handgun ban was unconstitutional. The Court might have reached the same result by employing the prevailing judicial methodology prior to *Heller* and simply deeming that flat bans on handguns are unreasonable, regardless of whether the right to bear arms is individual or collective.[43] Thus, the majority went out of its way to reify the individualized interpretation of the right. So far, the largely symbolic nature of the *Heller* ruling is borne out by the post-*Heller* cases in state and federal courts brought by plaintiffs of all stripes challenging a variety of local, state, and federal firearms regulations. In nearly all of those cases, courts have upheld the gun regulation in question in spite of *Heller*'s pronouncement of an individual right.[44] Even a court that ruled the Second Amendment was incorporated against the states still upheld the local gun regulation.[45]

In addition to positing an individual right, the opinion also sought to define "the people."[46] The Court conspicuously attempted to give meaning to this elusive phrase to bolster its initial conclusion that the second clause is not beholden to the prefatory clause: "The people" is different from a "well-regulated Militia." In fairness, the Court was not presented with the question of whether the Second Amendment applies to noncitizens. However, in deliberately trying to situate the right of armed self-defense in the pantheon of constitutional rights, Justice Scalia's opinion identifies the right-holders at different points

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[43] Brief for Petitioners at 40–58, *Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (noting that Court could rule on reasonableness *vel non* of regulation).

[44] *See, e.g.*, United States v. Jackson, 555 F.3d 635, 636 (7th Cir. 2009) (upholding conviction for possessing firearm "in furtherance of" drug-trafficking offense); United States v. Dorosan, No. 08-042, 2009 WL 273300 (E.D. La. Jan. 28, 2009) (upholding prohibitions of firearm possession in government buildings and stating that *Heller*'s protection of gun rights is not absolute); United States v. Radencich, No. 3:08-CR-00048(01)RM, 2009 WL 127648 (N.D. Ind. Jan. 20, 2009) (upholding felon-in-possession statute); United States v. Miller, No. CR 108-112, 2008 WL 5170440 (S.D. Ga. Dec. 9, 2008) (same); United States v. Baron, Nos. CR-06-2095-FVS, CV-08-3048-FVS, 2008 WL 5102307 (E.D. Wash. Nov. 25, 2008) (same); United States v. Bonner, No. CR 08-00389 SBA, 2008 WL 4369316 (N.D. Cal. Sept. 23, 2008) (same); Mullenix v. Bureau of Alcohol, Tobacco, and Firearms, No. 5:07-CV-154-D, 2008 WL 2620175 (E.D.N.C. July 2, 2008) (upholding Bureau of Tobacco, Alcohol, and Firearms determination that particular firearm could not be sold or imported because gun rights protected by Second Amendment are not unlimited).

[45] Nordyke v. King, 563 F.3d 439, 457–60 (9th Cir. 2009) (upholding Oakland gun regulation in spite of finding that Second Amendment was incorporated against states), *vacated en banc*, 2010 WL 2721856 (9th Cir. 2010).

[46] *Heller*, 128 S. Ct. at 2789–91 (2008) ("The first salient feature of the operative clause is that it codifies a 'right of the people.'").

as "all members of the political community," "all Americans," "citizens," "Americans," and "law-abiding citizens."[47] Subsequently, courts have identified the adjectival use of "law-abiding" and *Heller*'s ad hoc exclusions of "felons" and the "mentally ill"[48] as the gloss permitting felon-in-possession statutes to pass constitutional scrutiny.[49] However, courts have not yet devoted extended consideration to the implications of the majority's insistence that only "citizenry" may enjoy the right.

Only two post-*Heller* federal district courts entertained challenges by defendants using *Heller* to attack the constitutionality of the federal criminal ban on possession by undocumented persons.[50] The magistrate's recommendation in *United States v. Boffil-Rivera* concluded that the defendant-immigrant's advancement of a facial challenge (as opposed to an as-applied challenge) was fatal to his claim.[51] However, the *Boffil-Rivera* court also reviewed precedent, including *Heller*, to determine the scope of "the people" and concluded that unlawful aliens were excluded from constitutional protections.[52] In addition, only one scholar has squarely, albeit briefly, addressed *Heller*'s nascent alienage implications, arguing that as a matter of public policy arms-rights are "properly restricted to citizens" and warning that expansive definitions of "the people" in the Second Amendment could lead to the "bizarre and extraordinarily troubling" result of permitting unlawful aliens and other noncitizens to possess firearms.[53]

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[47] *Id.* at 2790, 2791, 2815 n.24, 2816, 2818.

[48] *Id.* at 2816–17 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.").

[49] *See, e.g.*, Wilson v. State, 207 P.3d 565, 567 (Alaska Ct. App. 2009) (citing *Heller*'s language in discussion regarding whether Alaskan Constitution's right-to-bear-arms provision prohibited statutes criminalizing felon firearm possession).

[50] 18 U.S.C. § 922(g)(5)(A) (2006) (criminalizing firearm possession by noncitizens "illegally or unlawfully in the United States"); United States v. Guerrero-Leco, No. 3:08cr118, 2008 WL 4534226, at *2 (W.D.N.C. Oct. 6, 2008) (upholding § 922(g)(5) against *Heller*-based challenge made by individual "who allegedly entered and remained unlawfully"); Report & Recommendation on Defendant's Motion to Dismiss Count 14 at 7–13, United States v. Boffil-Rivera, No. 08-20437-CR-GRAHAM/TORRES (S.D. Fla. Aug. 12, 2008), *available at* http://volokh.com/files/boffilrivera.pdf [hereinafter *Boffil-Rivera*] (upholding § 922(g)(5)(A) against *Heller*-based challenge).

[51] *Boffil-Rivera*, *supra* note 50, at 14–15.

[52] *Id.* at 13 ("His mere presence here does not entitle him to constitutional protection because he is clearly outside the scope of the 'political community' who are conferred rights under the Second Amendment.").

[53] Klukowski, *supra* note 9, at 237–38. The author fails to provide a reason as to why such a result would be either bizarre or troubling. Importantly, and in fairness, the focus of the scholar's work is whether and how the Second Amendment can be incorporated through the Privileges or Immunities Clause of the Fourteenth Amendment rather than

The lack of attention by litigants and academics to the "citizens" specified by the *Heller* majority makes sense if the reference was inadvertent or was a colloquial allusion to a general class of persons to whom all civil rights inure.[54] Such a reading, however, imputes a significant degree of sloppiness and imprecision into a profound pronouncement on the scope of a fundamental right. In a doctrinal world where citizenship as a legal status often matters, casual usage of the term "citizen" to describe rights beneficiaries is problematic.[55] The majority's references to the arms-bearing right of "Americans" conjures classic images of a nation (as opposed to a state) in which the category houses all those believing in the ideals and values represented by the term. Unfortunately, the term does not aid in specific allocations of constitutional rights unless "Americans" is understood to be synonymous with "citizens."

The term "citizens" specifically defines a legal status noted in the Constitution and created by U.S. immigration and naturalization law.[56] As such, interpreting the Second Amendment to effect a citizenship restriction affects the rights of a substantial portion of the population and implicates federal and state legal frameworks regulating the treatment of noncitizens. A complex web of federal and state regulations governs noncitizen firearm use and possession. As noted, federal law deems firearm possession by undocumented persons a crime.[57] The federal immigration code includes "firearms offenses" in the category of violations that trigger deportation of any noncitizen, including legal permanent residents.[58] In addition, a citizenship restriction in the Second Amendment could bear upon the constitutionality of the laws of several states that prohibit, limit, or treat noncitizen firearm possession unequally now that the Amendment has been incorporated.

Heller's references to "citizens" and "members of the political community" then invite the question of whether the Constitution compels reading "the people" of the Second Amendment to mean

through the Due Process Clause and is not an extended meditation on citizenship and the right to bear arms.

[54] I must thank Professor Eugene Volokh for encouraging me to consider this important possibility.

[55] *See supra* note 10 (discussing basic categories of membership and nonmembership vis-à-vis U.S. immigration laws).

[56] 8 U.S.C. § 1101 (2006).

[57] *See supra* note 50 (identifying federal prohibition and post-*Heller* cases challenging it).

[58] 8 U.S.C. § 1227(a)(2)(C) (2006) ("Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying . . . any weapon, part, or accessory which is a firearm . . . is deportable.").

"citizens." The Constitution uses the words "citizens," "persons," and "people," and does so, presumably, for distinct, although not precisely defined, purposes.[59] For specific provisions, U.S. citizenship is treated differently from foreign citizenship. The jurisdiction clauses of Article III specify that the federal courts' power extends over "Citizens of . . . State[s]."[60] To differentiate unnaturalized persons, the same section provides for jurisdiction over "foreign States, Citizens or Subjects."[61] In addition, the Constitution delineates "citizenship" as a qualification for the presidency and federal public office.[62] These careful distinctions between U.S. citizenship and noncitizenship are in contrast to the more general terms employed with respect to other rights and protections.

The uncertainty regarding the precise contours of "the people" in the Constitution reflects the indeterminacy of the phrase at the Constitution's creation. Prior to the Constitution and continuing into its early years, the concept of "the people" was murky.[63] Citizenship in the founding era was not, as it is today, in opposition to legal categories such as permanent, temporary, and undocumented immigrants; rather, citizenship as a marker of allegiance was used in opposition to British loyalists.[64] In fact, the governments of newly formed states expected significant foreign immigration and welcomed it—from approved sources—to settle the vast territories.[65] The Articles of Confederation directly preceding the Constitution employed the more

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[59] *See, e.g.*, U.S. CONST. pmbl. ("We the People"); *id.* art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."); *see also* Sugarman v. Dougall, 413 U.S. 634, 651 (1973) (Rehnquist, J., dissenting) (noting that Constitution refers to "citizens" eleven times in its text).

[60] U.S. CONST. art. III, § 2.

[61] *Id.* The statutory basis for jurisdiction pursuant to Art. III, § 2 provides for jurisdiction over "citizens or subjects of a foreign state." 28 U.S.C. § 1332(a)(2) (2006).

[62] U.S. CONST. art. I, §§ 2, 3; *id.* art. II, § 1.

[63] JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 209 (1978) ("By the beginning of the nineteenth century, then, Americans had only begun to discover the complexity of the question 'Who are "the People?' They were committed to certain principles about the acquisition of citizenship, but they had yet to develop fully the meaning of that status."); *see also* Williams, *supra* note 27, at 908 ("Thus, when the Framers discussed revolution, they imagined the People acting as a body, an organic entity with a single will.").

[64] *Id.* at 184–85, 208.

[65] *Id.* at 213 ("The new states not only sought the loyalty of their present inhabitants and former fellow subjects; they also extended a broad welcome to the foreign-born."). Note, however, that this welcome often extended only to whites from specific parts of Europe. *Id.* at 215–16.

inclusive "free inhabitants" to delineate its scope and in specific instances referred to the citizens of the several states.[66]

Aside from a notable deviation in *Dred Scott v. Sandford*, wherein Chief Justice Taney expressly equated "the people" with white "citizens,"[67] no definitive historical or contemporary authority treats the two as synonyms. Even that digression was rectified and overruled by the Fourteenth Amendment.[68] The Fourteenth Amendment uses the term "persons" and "citizens" in consecutive clauses,[69] persuasively indicating that at least by the Reconstruction era, the Constitution's use of "citizens" meant legal status as such, whereas use of "people" and "persons" did not.[70] These textual and structural elements suggest that the drafters of the Fourteenth Amendment used the word "citizen" when they intended to limit strictly the scope of those subject to constitutional protection, an insight which reaffirms that the Constitution does not always employ such a restriction in its protections of individual rights. The Second Amendment eschews any mention of this limited class of persons.

Perhaps because of this uncertainty, and a desire to avoid *Dred Scott*'s discredited reading, the Court's *United States v. Verdugo-Urquidez* opinion—its only other extended consideration of "the people"—resisted constricting "the people" to citizens.[71] In that case, the defendant, a citizen of Mexico who was apprehended in Mexico

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[66] *Id.* at 220 (citing ARTICLES OF CONFEDERATION IV, *available at* http://avalon.law.yale.edu/18th_century/artconf.asp ("[T]he free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States . . . .").

[67] 60 U.S. (19 How.) 393, 404 (1856) ("The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing."); *see also infra* notes 146–50 and accompanying text (discussing *Dred Scott* decision).

[68] U.S. CONST. amend. XIV; *In re* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72–73 (1872) (interpreting first section of Fourteenth Amendment and noting that effect was to remove difficulty posed by *Dred Scott*'s understanding of who were and could become citizens).

[69] *See* Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 340–41, 349–50 (2005) (emphasizing the importance of the citizen-noncitizen distinction after the passage of the Fourteenth Amendment). *Compare* U.S. CONST. amend. XIV, § 1, cl. 2 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."), *with id.* amend. XIV, § 1, cl. 3 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

[70] *See* U.S. CONST. amend. XIV, § 1, cl. 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States . . . .").

[71] United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that Mexican national captured in Mexico, but being prosecuted in U.S. federal court, could not assert a Fourth Amendment claim against search of his residence in Mexico by U.S. and Mexican authorities).

and turned over to U.S. authorities for prosecution in U.S. federal court, argued that the federal government violated the Fourth Amendment when it conducted a search of his house in Mexico without a warrant.[72] The Court ruled, however, that despite U.S. prosecution of the defendant, the Fourth Amendment's prohibition on unreasonable searches and seizures did not apply to the search of a Mexican national's home in Mexico because his ties to the United States were insufficient to claim constitutional protections.[73] In short, he was not one of "the people" protected by the Bill of Rights.

The Court concluded that "the people" written in the First, Second, Fourth, Ninth, and Tenth Amendments included those "who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[74] The *Verdugo-Urquidez* Court nevertheless declined to explain who else beyond citizens may be included within the phrase, expounding that constitutional protections may inure to aliens when "they have come within the territory of the United States and developed substantial connections with this country."[75] The opinion leaves the definition of "the people" vague and without a precise connection to citizenship status.[76]

Notably, the *Verdugo-Urquidez* Court could have reached its decision by deciding the U.S. Constitution had no extraterritorial effect in Mexico's sovereign land, rather than ruling on the scope of "the people."[77] The Court could have relied on a geographic, rather than a textual, hook to decide the case.[78] As Justice Kennedy wrote in his concurrence, "the people" may delineate the importance of the right, rather than delimiting the class to whom the right applies.[79] Like

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[72] *Id.* at 262–64.

[73] *Id.* at 271–74.

[74] *Id.* at 265.

[75] *Id.* at 271.

[76] The Court's incomplete analysis has been highly criticized. *See* Michael J. Wishnie, *Immigrants and the Right To Petition*, 78 N.Y.U. L. REV. 667, 680–82, 681 n.74 (2003) (summarizing condemnation of *Verdugo-Urquidez*).

[77] *See Verdugo-Urquidez*, 494 U.S. at 276 (Kennedy, J., concurring) ("The restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend, as a consequence, on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of 'the people.'").

[78] *Id.* at 267 ("There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters.").

[79] *Id.* at 276 (Kennedy, J., concurring) ("Given the history of our Nation's concern over warrantless and unreasonable searches, explicit recognition of 'the right of the people' to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it.").

Heller then, *Verdugo-Urquidez* conspicuously, and needlessly, attempts to interpret "the people" of the Constitution. Both, however, fall woefully short, leaving this important question undertheorized and unsatisfactorily resolved.

The *Verdugo-Urquidez* case is important to understanding *Heller*'s analysis for two related reasons. First, Justice Scalia—*Heller*'s author—joined the majority opinion in *Verdugo-Urquidez*. As such, he was surely aware that *Verdugo-Urquidez*'s exegesis of "the people" leaves open the possibility that classes of noncitizens, even undocumented immigrants, with sufficient connection to the national community could be included within that case's indeterminate standard of "the people."[80] While *Verdugo-Urquidez* assures us that involuntary presence within the nation's territorial boundary and the exercise of federal jurisdiction on an individual is insufficient to trigger much of the Bill of Rights, it does not go so far as to revert to *Dred Scott*'s—or, ultimately, *Heller*'s—equation of "the people" with "citizens."[81]

Second, Scalia's formulation of "the people" in *Heller* contradicts, while purporting to affirm, *Verdugo-Urquidez*'s definition. Citing *Verdugo-Urquidez*, the *Heller* majority suggests that it adopts that opinion's understanding that "the people" meant "all members of the political community."[82] This misquotation of the prior opinion appears to be a sleight of hand intended to constrict the constitutional definition of "the people." Reformulating membership with a "political" rather than a "national" lens is significant because the former implies only those with political rights[83]—e.g., voting, public office—while the latter is malleable, potentially including all who believe in the ideals of, and are connected to, the nation.

Verdugo-Urquidez's broader formulation, aside from being established law, is normatively preferable to *Heller*'s restriction.[84] As noted

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[80] *See Boffil-Rivera*, *supra* note 50, at 11 ("*Verdugo-Urquidez* is but one example of a series of cases that foreign nationals . . . are not entitled to *all* the rights and privileges of American citizens." (emphasis added)); *cf.* Plyler v. Doe, 457 U.S. 202 (1982) (holding that states could not, consistent with federal equal protection guarantee, deny children of undocumented immigrants public education on par with other children).

[81] *See Verdugo-Urquidez*, 494 U.S. at 271 (limiting Fourth Amendment protections to those who have developed substantial and voluntary connection to national community).

[82] District of Columbia v. Heller, 128 S. Ct. 2783, 2790–91 (2008) ("What is more, in all six other provisions of the Constitution that mention 'the people,' *the term unambiguously refers to all members of the political community*, not an unspecified subset." (emphasis added) (citing *Verdugo-Urquidez*, 494 U.S. at 265)).

[83] *See* Klukowski, *supra* note 9, at 224 ("In *Heller* the Court recognized that 'the people' has a political connotation . . . .").

[84] I say this without endorsing the *Verdugo-Urquidez* reasoning or result. Justices Brennan and Marshall advocated the use of a test of reciprocity: Any time when the government exercises its jurisdiction over an individual, the Constitution restricts its actions, regardless of where the individual or property is located, and regardless of whether the

above, "the people" was a fluid concept at the founding, and the framers seem to have employed the limiting terminology of "citizen" in the Constitution deliberately. While it is true that currently noncitizens cannot exercise certain core political rights, the Constitution itself does not compel denial of those rights to noncitizens. The franchise, jury service, and the holding of state office are limited to citizens by operation of statutes and state constitutional provisions, not by federal constitutional command. Alien suffrage disappeared from the political landscape only in the 1920s,[85] and even now noncitizens can exercise some forms of political speech and contribute to political campaigns.[86]

In altering—and thereby contracting—the definition of "the people" to political membership as a function of constitutional interpretation, the *Heller* majority recalls *Dred Scott*'s express limitation on constitutional reach and departs from more recent precedent. This move of redefining and constricting "the people," as Professor Angela Harris notes, has long been one of the tools employed by empowered elites to ostracize nonwhite, non-males from the Constitution's largesse.[87] Extending that logic to another politically vulnerable group like noncitizens helps highlight the marginalizing potential of *Heller*'s sub silentio tightening of *Verdugo-Urquidez*.[88]

If intentional, *Heller*'s rhetorical shift appears to continue a restrictionist project by some members of the Court to protect only

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defendant or suspect is a citizen or not. *See Verdugo-Urquidez*, 494 U.S. at 281–90 (Brennan, J., dissenting, joined by Marshall, J.).

[85] Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1416–17 (1993) ("'For the first time in over a hundred years, a national election was held in 1928 in which no alien in any state had the right to cast a vote for a candidate for any office—national, state, or local.'" (quoting Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114, 114 (1931))).

[86] Kostas A. Poulakidas, *The Trojan Horse of the 21st Century: Immigrants, Foreign Campaign Contributions and International Politics*, 6 IND. J. GLOBAL LEGAL STUD. 341, 342–43 (1998) (chronicling increasing phenomena of immigrant campaign contributions to influence candidate views and policy outcomes). *But see* Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441(e) (2006) (prohibiting noncitizens other than legal permanent residents from making contributions to federal, state, and local campaigns).

[87] Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 582–83 (1990) ("Despite its claims, however, [the voice of 'the people'] does not speak for everyone, but for a political faction trying to constitute itself as a unit of many disparate voices; its power lasts only as long as the contradictory voices remain silenced.").

[88] *Cf.* Williams, *supra* note 27, at 885 ("In my view, it is time to accept [that armed resistance in present-day America would be a civil war]; it is time to stop conjuring with the idea of an organic American people, because that idea leads us in the direction of the militia's thinking—to the creation of an alien Other against whom we could all be united.").

citizens from governmental action.[89] But even if unintentional, the majority's allusions to "citizens" and "members of the political community"[90] provide previously unavailable constitutional sanction to noncitizens' exclusion from constitutional protection. In the context of the case, the restriction is even more poignant because of the unique nature of the right in question: the right to possess an instrumentality of deadly force. As Part II will argue, *Heller*'s consequences for noncitizens' rights—and for immigrants' subordination to the citizenry's armament—continues a theme prevalent in federal and state regulation of noncitizens' firearm possession.

Undoubtedly, one could argue that *Heller* gun rights are sui generis and that "the people" in the Second Amendment is narrower and more precisely defined than in other constitutional provisions. While this interpretation is plausible, it would undermine the *Heller* majority's painstaking exegesis of "the people," including the guidance sought from other constitutional allusions to the phrase.[91] In addition, it ironically would contradict *Heller*'s fundamental holding regarding the individualized and self-protective characteristics of the right to bear arms. If "the people" referenced in the Second Amendment meant citizens, while the same phrase in the Fourth Amendment meant a broader class of persons with substantial connections, then the Second Amendment is exceptional in requiring obligation and loyalty to—and recognition by—the state in order to seek its protection. Conditioning the right on an intimate tie to the state suggests that the Amendment is not actually about self-defense, but about state-defense.[92] As discussed in Part II.A, precolonial and early colonial gun laws in some states limited such rights to subsects of the citizenry: white males deemed loyal to state interests.[93] However, *Heller* rejected this reading in its characterization of the Second Amendment right as an individual right to self-defense, and therefore

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[89] *Cf.* Hamdan v. Rumsfeld, 548 U.S. 577, 669–70 (2006) (Scalia, J., dissenting) (arguing that writ of habeas corpus does not extend to noncitizen enemy combatants held at Guantánamo Bay); Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) (arguing that as citizen, Hamdi deserved hearing in Article III court and protection of habeas corpus).

[90] District of Columbia v. Heller, 128 S. Ct. 2783, 2790–91 (2008).

[91] *Id.*

[92] *Cf.* Cornell, *supra* note 27, at 245 ("Rather than view the right to bear arms as an expression of a right of resistance, it would be far more accurate to see the language of . . . the [F]ederal Constitution as part of an effort to provide the state with a means to crush such resistance.").

[93] *Id.* at 229 ("Only citizens who were willing to swear an oath to the state could claim the right to bear arms."); *see also infra* notes 143–44 and accompanying text (discussing gun-ownership restrictions in early republic).

its tightening of "the people" relative to its other uses in the Constitution is plausible only at the expense of its keystones.

B. *Incorporation of the Second Amendment and Noncitizens*

Recently, in *McDonald v. City of Chicago*, the Supreme Court ruled that *Heller*'s interpretation of the Second Amendment applied against states and localities as well.[94] Prior to *McDonald*, *Heller* could fairly be read to apply against only the federal government;[95] subfederal entities were free to regulate gun possession to the extent permitted by their own constitutional limitations on such regulation.[96] Incorporation of the Second Amendment against the states presumably alters the doctrinal analysis of noncitizen gun laws at the state level. After *McDonald*, states and localities may find it more difficult to justify citizenship-conscious gun laws with equal protection jurisprudence, federalism rationales, and state right-to-bear-arms provisions that have thus far produced a variety of results in litigated cases.[97] Instead, the Second Amendment will stand on its own, allowing challenges to state regulation based solely on the Federal Constitution's protection of firearms possession. In these predicted challenges, *Heller*'s description of rights-holders as "law-abiding citizens" will feature prominently, with a focus on the "citizen" descriptor as well as the "law-abiding" label.

In addition, while the fact of incorporation may force doctrinal shifts in the defense of state and local gun laws with citizenship distinctions, the method of incorporation also invigorates debate regarding noncitizens' rights under the Constitution. In determining the nature of the right to bear arms as incorporated, the *McDonald* plurality ruled both that the right was fundamental[98] and that it was

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[94] McDonald v. City of Chicago, No. 08-1521, slip op. (U.S. June 28, 2010).

[95] Recall that *Heller* involved a District of Columbia regulation, which is under federal control. *See* Brief for Petitioners at 36–38, *Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (noting that District of Columbia is federal enclave created by Congress).

[96] *See* Presser v. Illinois, 116 U.S. 252, 267–69 (1886) (upholding state firearms restrictions against Second Amendment challenge); State v. Vlacil, 645 P.2d 677, 679–81 (Utah 1982) (upholding state alien gun laws after finding them within state police power and not in conflict with federal power).

[97] *See, e.g.*, State v. Hernandez-Mercado, 879 P.2d 283, 286–90 (Wash. 1994) (upholding Washington's alienage distinction in firearms law against both preemption and equal protection challenges); *Vlacil*, 645 P.2d at 679–80 (upholding Utah's ban on alien gun possession against federal and state constitutional guarantees of right to bear arms and federal preemption challenges); People v. Nakamura, 62 P.2d 246, 247 (Colo. 1936) (striking down alienage restriction in state gun law because it deprived aliens of right to defend themselves and their property).

[98] *McDonald*, slip op. at 11 (U.S. June 28, 2010) ("We . . . consider whether the right to keep and bear arms applies to the States under the Due Process Clause."); *id.* at 31 ("In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the

part of Due Process as protected by the Fourteenth Amendment.[99] Both aspects of the holding profoundly affect the ability to limit arms bearing to citizens.

First, once a right is deemed fundamental for self-preservation, a distinction based on citizenship status would appear to be irrational, unless noncitizens were proven to be the specific and unique source of danger to citizens.[100] Second, the incorporative methodology is significant because the Fourteenth Amendment's Due Process Clause speaks in terms of "person[s]," presumably the broadest formulation of those to whom constitutional rights inure.[101] Even if the framers believed "the people" was meant to include only their definition of citizens, the transformative power of the Fourteenth Amendment would broaden that vision.

McDonald, however, is a fractured opinion, with only four Justices agreeing that the Due Process Clause, with its use of "persons," is the proper vehicle for incorporating the Second Amendment. The critical fifth vote for the judgment was provided by Justice Thomas, who, along with several legal scholars, argued that the right to bear arms should be enforced against subfederal entities through the Privileges or Immunities Clause of the Fourteenth Amendment instead of the Due Process Clause.[102] Doing so clearly creates inter-

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right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

[99] Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[100] *See Nakamura*, 62 P.2d at 247; *cf.* Foley v. Connelie, 435 U.S. 291, 296 (1978) (permitting states to limit state trooper positions to citizens because noncitizens are excludable from government positions that require exercising discretion and enforcement power over citizens); Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (permitting internment of persons of Japanese descent because of potential danger and loyalty concerns during war).

[101] U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); *see, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 725–27 (1893) (upholding law allowing deportation of Chinese workers but affirming that Fourteenth Amendment protects persons and that ability of state to exercise arbitrary power over alien residents was curtailed by Amendment).

[102] U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."); *McDonald*, slip op. at 1 (Thomas, J., concurring in judgment) ("I agree with [the plurality's description of the right to bear arms as fundamental]. But I cannot agree that it is enforceable against the States through a clause that speaks only to 'process.' Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities clause."); *see, e.g.*, Klukowski, *supra* note 9, at 212–15 (discussing differences between incorporation of Bill of Rights through Privileges or Immunities Clause and Due Process Clause and concluding "incorporating . . . through the Privileges or Immunities Clause is preferable"). Akhil Reed Amar agrees and has suggested the catalytic power of the Fourteenth Amendment resides in the Privileges or Immunities Clause. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 221–22 (1998).

pretative difficulties vis-à-vis citizenship.[103] Rights that were written into the Constitution as protections for persons or the people against federal action[104] could be transformed into prohibitions only on state actions abridging the rights of citizens. Thus, a suite of protections and rights with indeterminate reach could be limited only to citizens.[105] Although Justice Alito's plurality opinion dismissed the Privileges or Immunities Clause argument,[106] his lack of a majority, combined with Justice Thomas's perspective, leaves open the possibility that citizen-

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Note that in *McDonald*, the National Rifle Association and other amici were at odds over the appropriate method of incorporation. *Compare* Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners, *McDonald*, slip op. (U.S. June 28, 2010) (No. 08-1521) (urging Supreme Court to accept certiorari to reconcile incorporation jurisprudence through Privileges or Immunities Clause), *with* Brief for Respondents the National Rifle Association of America, Inc. et al. in Support of Petitioners, *McDonald*, No. 08-1521, slip op. (U.S. June 28, 2010) (No. 08-1521) (urging Supreme Court to incorporate *Heller* self-defense right into Due Process Clause or, in alternative, into Privileges or Immunities Clause); *see also* Robert Barnes, *NRA Avoids Getting Shut Out of Gun Case*, WASH. POST, Feb. 8, 2010, at A13 (noting infighting regarding whether to focus primarily on Privileges or Immunities Clause or Due Process Clause in oral argument).

103 *McDonald*, slip op. at 11 (Thomas, J., concurring in judgment) ("The group of rights-bearers to whom the Privileges or Immunities Clause applies is, of course, 'citizens.'"); *see, e.g.*, Cristina M. Rodríguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, U. PA. J. CONST. L. 1363, 1369 (2009) ("To be sure, the fact that the Equal Protection Clause extends to all persons but that the Privileges and Immunities Clause applies only to citizens could be read to suggest that the Constitution tolerates tiers of membership.").

104 U.S. CONST. amend. I ("[T]he right of the people peaceably to assemble . . . ."); *id.* amend. IV ("The right of the people to be secure in their persons . . . ."); *id.* amend. VI (delineating right-holders as "the accused").

105 *But see* David Gans, *The Privileges or Immunities Clause & the Constitutional Right of Aliens*, BALKINIZATION (Nov. 24, 2009, 12:08 PM), http://balkin.blogspot.com/2009/11/privileges-or-immunities-clause.html (arguing that critique stating that using Privileges or Immunities Clause to understand incorporation would exclude noncitizens from constitutional protections "falls wide of the mark").

Gans's account depends in part on reading cases such as *Graham v. Richardson*, 403 U.S. 365 (1971) as resting firmly on equal protection grounds. *Id.* For further discussion of *Graham*, see *infra* note 110 and accompanying text. Gans's account, however, fails to account for the significant and consistent equivocation in the Court's alienage jurisprudence that vacillates between understanding alienage distinctions as problems of equal protection versus questions of federal plenary power. *See, e.g.*, David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1070 (1979) (noting that several decisions regarding noncitizens may be read as federal power and preemption cases just as persuasively as, if not more so than, equal protection cases). Indeed, in *Graham* itself, the Court provides two justifications for its ruling that states may not discriminate against noncitizens in welfare distribution: one based in equal protection, the other in federal preemption. *Graham*, 403 U.S. at 376, 376–77.

106 *McDonald*, slip op. at 10 ("For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughterhouse* holding.").

ship distinctions could factor prominently in analyzing beneficiaries of fundamental rights.

Applied generally to the entire Bill of Rights, Thomas's methodology would allow important liberties such as search and seizure protections and jury trials for noncitizens to be left to political majorities in the several states. The Second Amendment, specifically, would protect only the citizenry, the same result implied by the *Heller* majority. As such, the same concerns attendant to limiting fundamental rights to citizens in federal lawmaking would apply in the subfederal context as well. The gravity of the rights in question—the basic personal liberty guarantees of the Constitution—renders state alienage distinctions bad public policy. These are rights specifically insulated from the tyranny of the majority, and noncitizens would be an easy target for disarmament and denial of basic civil rights. The Court has long rejected untrammeled government actions that deprive noncitizens of constitutional protections that comport with notions of fundamental fairness.[107]

II
RACE, CITIZENSHIP, XENOPHOBIA, AND THE RIGHT TO BEAR ARMS IN THE AMERICAN LEGAL NARRATIVE

Much of Second Amendment scholarship—and the dispute between the majority opinion and dissents in *Heller* is no exception—conjures conflicting histories regarding gun regulation in America. The historical debate rehashes the longstanding argument about whether the Second Amendment should be understood as a collective or individual right. Less explored, however, is the historical relationship between guns and citizenship. As Part I concludes that *Heller*'s apparent reformulation of "the people" is jurisprudentially and normatively unsound, Part II situates *Heller*'s nascent citizenship talk within historical context. Such a reading of *Heller* develops a richer understanding of exclusionary firearms regulation and helps to illuminate the perniciousness of contracting the meaning of "the people."

Although *Heller*'s language raises anew the possibility that gun rights might be citizens' rights, this rhetorical and legal maneuver in the majority opinion, it turns out, is unremarkable in American legal history. The white majority has often used gun regulation as a tool to keep firearms out of the hands of politically unpopular groups that it

[107] *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 237 (1896) (ruling that federal government violated Constitution when it imposed hard labor as punishment prior to deportation of unlawful immigrants without trial).

deemed to be too dangerous. The fact that contemporary citizenship limitations on gun rights fit neatly into this historical theme and tradition of restriction does little to justify *Heller*'s potential for excluding noncitizens from gun rights. Rather, it condemns such a possibility.

Heller's pronouncement is situated within a historical narrative that has long kept firearms from noncitizens and racial minorities. Surveying critical moments in the evolving relationship between firearms and citizenship reveals this cohesive narrative centered on both maintaining a racially exclusive conception of citizenship and disarming noncitizens. Such legal proscriptions coincided with increased immigration from outside of western and northern Europe and with increasingly racially and ethnically diverse citizenship.[108] The expanded racial inclusiveness of citizenship after the Civil War and the period of mass migration which followed coincided with an era of regulation related to firearms and immigration.[109] From the early years of the republic through the mid-twentieth century, explicit and thinly veiled alienage and racial prohibitions helped maintain racial exclusivity in firearms possession. More recently, as racial, national origin, and alienage distinctions have been subjected to heightened judicial scrutiny,[110] lack of gun rights has nevertheless remained a marker of second-class membership and diminished privileges. The story of citizenship and guns is, in large part, one of racial prejudice and xenophobic paranoia, motivated by a fear of a racialized or foreign "Other" presenting danger to white, Anglo-Saxon, Protestant citizens and the nation's republican institutions.[111]

The purpose of tying together this narrative is to showcase a recurring strand of American gun possession and regulation—a strand that consistently conflicts with other deeply ingrained constitutional values based on equality. To the extent that *Heller* reinvigorates the potential for citizenship-conscious regulation, it does so in the shadow

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[108] *See infra* Part II.B (discussing migration from Asia, Latin America, and southern and eastern Europe).

[109] *See infra* Part II.B (discussing proliferation of gun regulation).

[110] *Graham*, 408 U.S. at 376–77 (1971) (subjecting state alienage distinctions in welfare law to strict judicial scrutiny and striking down Arizona's and Pennsylvania's provisions limiting public benefits to noncitizens).

[111] *See e.g.*, Williams, *supra* note 27, at 882–83 ("In other words, the People have their unity in opposition to the hypothesized 'Other' (Jews, Blacks, bankers, etc.) that seeks to oppress the People."); *see also* Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 637 (2005) (arguing that naturalization is not equalizing societal factor due to prevalence of racial prejudice and paranoia in society today); *cf.* Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 607 (2009) ("Otherness, with its attendant devaluation of the Other, facilitates the abuse and exploitation of particular individuals. Otherness operates across multiple dimensions to reinforce a conception of a virtuous 'Self' and a lesser 'Other.'").

of a legacy marred by racialized and xenophobic fears. This is significant because in other constitutional contexts, the Court has deployed examination of history and tradition to undergird its determination of the scope of a fundamental right.[112] Thus, unable to withstand the constitutional and doctrinal inquiry in Part I, exclusionary gun rights are also stained by a dubious historical legacy, as this Part reveals. Subsequently, Part III will probe whether any other coherent theory of citizenship-only rights may nevertheless justify the citizenship reading of the Second Amendment.

Relying on the work of historians, this Article chronicles watershed moments in the relationship between the right to bear arms and ideas of citizenship. At the outset, I must concede that I am not an historian, and this Article does not purport to provide a complete historical survey of noncitizen gun possession. As such, the claims made here are solely correlative and not causative; that is, this Article suggests a strong correlation between times of intense racism and xenophobia, related legislative or judicial expressions, and gun regulations aimed at politically less powerful groups. I have chosen specific and representative legal landmarks to help highlight three persistent overlapping storylines: (1) citizenship as a malleable and unstable concept—its content often manipulated by political majorities and determined by the ability of certain demographic groups to lay claim to their status and its attendant privileges; (2) disarmament as a badge of enslavement and inferior membership status, and, its corollary, armament as a sign of free and full citizenship;[113] and (3) foreigners and foreign influences as sinister and dangerous to the physical safety of citizens and the well-being of republican institutions. While not offering a definitive historical profile, I explain that these three themes are persistent features of the American legal and political landscape. And although these themes resonate generally in the

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[112] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment) (arguing that rights protected by Due Process Clause could be determined in part by "continual insistence upon respect for the teachings of history"). *Compare* Michael H. v. Gerald D., 491 U.S. 110, 122–24 (1989) (Scalia, J., plurality opinion) (limiting substantive due process rights to fundamental rights grounded in history and tradition), *with id.* at 139 (Brennan, J., dissenting) (engaging in colloquy about importance, applicability, and understanding of history, which together govern interpretation of fundamental rights under Due Process Clause of Fourteenth Amendment).

[113] *See, e.g.*, Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1374 (1993) ("From [the perspective that the Second Amendment was motivated by anxieties over slave control], the Second Amendment appears to be a remnant from an era that ended in 1865 when the Thirteenth Amendment was enacted and slavery was abolished."); David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People To Keep and Bear Arms,"* 22 LAW & HIST. REV. 119, 147 (2004) (associating disarmament with slavery).

American story, their specific manifestation in gun regulation showcases the centrality of the Second Amendment in constructions of American citizenship and identity.

The subsections in Part II divide noncitizen and racially motivated gun regulation into three time periods: (1) the founding to the Civil War; (2) Reconstruction to the early decades of the twentieth century; and (3) the mid-twentieth century to present day. I choose these three segments because each includes milestone declarations regarding noncitizen gun possession and the importance of citizenship. This Part argues that fear- and prejudice-based regulation of noncitizen and minority possession have been a persistent feature in the background of the American legal landscape. Additionally, this part showcases the malleability and instability of citizenship as a storehouse for important rights. These themes, which resonate in *Heller*, persist to present day.

A. Guns and Citizens from the Founding to the Civil War

The pre-Revolution and founding-era firearm restrictions were harbingers for the themes that have consistently pervaded gun regulation. First, prohibitions on ownership by African Americans literally ensured continued enslavement and kept free blacks in the same position as slaves vis-à-vis firearms.[114] Second, disarmament of British loyalists and some religious minorities was rooted in distrust of foreign influences in the new republican nation.[115] Third, since only "First-Class citizens" were allowed to vote, bear arms, and serve on juries,[116] many other citizens—poor whites, women, minors, free blacks—were denied many fundamental rights presently associated with citizenship.[117] Accordingly, citizenship was only tenuously connected to rights,[118] whereas, in today's doctrinal world, such rights would be

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114 CLAYTON E. CRAMER, ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE 26 (2006) ("[Colonial racial divisions in militia service] soon encompassed not only slaves but free blacks as well."); LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA 50 (1975) (describing early laws preventing blacks from gun ownership).

115 *See infra* notes 137–41 and accompanying text (discussing disarmament based on foreign identity in early republic).

116 AMAR, *supra* note 102, at 48, 258–59.

117 *Id.*

118 *See* KETTNER, *supra* note 63, at 323 ("[T]he right to the elective franchise had never seemed absolutely inherent in the status [of citizenship]; it had always been subject to a wide range of limitations and qualifications even among the white citizenry."); *see also* Wishnie, *supra* note 76, at 690–91 (arguing that citizenship during colonial and founding era was "unsettled concept" that may have had little to do with framers' intent when deciding to whom constitutional benefits would inure).

considered fundamentally connected to one's citizenship status.[119] Furthermore, this section will showcase how the citizenship reading of "the people" uncomfortably reinvigorates the abandoned reasoning of *Dred Scott v. Sanford*.

Pre–Revolutionary War gun regulation did not necessarily depend on categories of legal citizenship but rather on a conception of membership in the national community contingent upon race, wealth, and gender. Before the Revolutionary War and the founding of the republic, firearms were prevalent among the white population.[120] Some colonial governments also required loyalty oaths before firearm possession.[121] Prevailing firearm laws in various states allowed for the disarmament of Catholics[122] and poor whites.[123] Blacks, whether free or enslaved, were heavily regulated, and colonial law generally disarmed them.[124] Several colonial governments also forbade the selling of arms and ammunition to members of Indian tribes.[125]

By the time of the Constitution's framing, statutes in the several states made guns a privilege of "First-Class Citizens," meaning that only select citizen males could legitimately exercise the right to bear

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119 *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 554–55 (1964) (stating that Constitution protects right of citizens to vote).

120 Robert H. Churchill, *Gun Regulation, the Police Power, and the Right To Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 142, 147 (2007) (noting that militia members armed themselves and thus most white males were accustomed to carrying guns).

121 Cornell, *supra* note 27, at 221, 228–29 (describing Pennsylvania's Test Acts and asserting that those who refused to take loyalty oath could be disarmed).

122 CRAMER, *supra* note 114, at 24.

123 *See* Churchill, *supra* note 120, at 156 (discussing scholarship identifying legislation intended to disarm Catholics and Quakers); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 507 (2004) (recounting eighteenth-century laws conditioning firearms on loyalty oaths and disarmament of certain religious minorities); *see also* Cornell, *supra* note 27, at 221, 228–29 (describing Pennsylvania's loyalty oath).

124 KENNETT & ANDERSON, *supra* note 114, at 50 (discussing first recorded legislation restricting gun ownership by free blacks in Virginia in 1640); Churchill, *supra* note 120, at 148 (detailing North Carolina's slave disarmament law); Thomas N. Ingersoll, *Free Blacks in a Slave Society: New Orleans, 1718–1812*, 48 WM. & MARY Q. 173, 178–79 (1991) (recounting Louisiana's 1751 adoption of provisions from royal Black Code of 1724 that required nonslaveholders to stop any black carrying any potential weapon). *But see* Cottrol & Diamond, *supra* note 17, at 326 (noting that South Carolina allowed some free blacks to possess firearms to help control slave population for a brief period).

125 *See, e.g.*, THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 138–40 (J. Hammond Trumbull ed., Hartford, Brown & Parsons 1850) (creating restriction against selling ammunition to Indian tribe members); 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 392 (Nathaniel B. Shurtleff ed., Boston, William White 1853) (demanding severe punishment for those who broke ban on selling ammunition or guns to Indian tribe members).

arms.[126] As Akhil Amar reminds us, at that time, arms bearing was considered congruent to voting, holding public office, or serving on juries—rights associated with each other and denied even to many citizens.[127] Militia membership and its attendant firearms rights and obligations were not extended to include poor whites until the first decades of the nineteenth century.[128]

This racialized, gendered,[129] and class-stratified understanding of persons permitted to own guns—and exercise other core political rights—began finding legislative imprimatur in immigration and militia regulations. First, the Uniform Naturalization Act of 1790 ensured that only whites were permitted to naturalize into citizens.[130] Second, after the First Congress passed the Bill of Rights and the Uniform Naturalization Act, the second Congress passed the Militia Act of 1792, specifying that the militia of the several states were to consist only of "white male citizen[s]."[131] Individual state constitutions codified restrictions on "Negroes, Mulattoes, and Indians" serving in state militias[132] or expressly limited firearms to "free white men."[133]

Indeed, the framers of the Constitution understood firearms to be uniquely American, while simultaneously circumscribing those considered American along ethnic and religious markers. While James Madison boasted that gun rights were an "advantage" that Americans

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126 AMAR, *supra* note 102, at 48; *see also* Cornell, *supra* note 27, at 235 ("[T]he meaning of the right to bear arms, unlike virtually any other right described in either state constitutions or the Federal Constitution was colored by the inchoate notions of class and rank that shaped American politics in this period.").

127 AMAR, *supra* note 102, at 48 (noting classification of such rights as those reserved to "First-Class Citizens").

128 Slotkin, *supra* note 2, at 56 ("Colonial militias excluded from service those residents who were not classed as freemen, a category that included poor whites . . . . The expansion of citizenship rights . . . through the Age of Jackson extended the franchise and the right and obligation of militia service to the white male portion of the excluded classes.").

129 I am not arguing that women were prevented from owning arms; rather, prevailing statutes and legal opinions gendered arms bearing in important ways. Women were excluded from militia service as were Indians and Negroes. A 1915 commentary baldly asserts that females could be prohibited from gun possession. *See* Lucilius A. Emery, *The Constitutional Right To Keep and Bear Arms*, 28 HARV. L. REV. 473, 476 (1915) ("Women, young boys, the blind, tramps, persons *non compos mentis*, or dissolute in habits, may be prohibited from carrying weapons.").

130 An Act to Establish an Uniform Rule of Naturalization, ch. 3, § 1, 1 Stat. 103 (1790).

131 Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271 ("Be it enacted . . . [t]hat each and every free able-bodied white male citizen of the respective states . . . who is or shall be of the age of eighteen years, and under the age of forty-five years . . . shall severally and respectively be enrolled in the militia . . . .").

132 KY. CONST. of 1850, art. VII ("The militia of this Commonwealth shall consist of all free able-bodied male persons (negroes, mulattoes, and Indians excepted).").

133 TENN. CONST. of 1834, art. I, § 26 ("That the free white men of this State have a right to keep and to bear arms for their common defence.").

possessed over the peoples of other nations,[134] his coauthor, John Jay, projected a homogenous (albeit inaccurate) vision of the American people:

> With equal pleasure I have as often taken notice that Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence.
>
> This country and this people seem to have been made for each other, and it appears as if it was the design of Providence that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties.[135]

Taken together, the racial exclusions from militia service, racial restrictions in naturalization law, and expanding access for poor whites produced racially discriminatory gun rights, buttressed by racially discriminatory citizenship laws. As slaves were clearly not considered citizens—indeed, they were considered only three-fifths of a person[136]—and naturalization and militia service were legally restricted to whites, firearms were, in effect, only the privilege of whites.

Certain white inhabitants were also disarmed, but only those who could not claim the perceived ancestry, religion, or belief in the same principles of government extolled by John Jay.[137] As notable examples, both loyalists to the English crown[138] and certain religious minorities were disarmed by statute in the colonies and newly declared states.[139] Thus, an early feature of the emerging republic was

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134 THE FEDERALIST NO. 46, at 238 (James Madison) (Lawrence Goldman ed., 2008) ("Besides the advantage of being armed, which the Americans possess over the people of almost every other nation . . . .").

135 THE FEDERALIST NO. 2, *supra* note 134, at 15–16 (John Jay).

136 U.S. CONST. art. I, § 2.

137 CRAMER, *supra* note 114, at 38 ("While blacks and indentured white servants were often not enough trusted with guns to serve as armed members of the militia, free whites were *generally* trusted with firearms. There were some exceptions: Particular religious minorities were not trusted . . . .").

138 *See, e.g.*, Churchill, *supra* note 120, at 149–50 (noting Loyalist outcry at threat of being disarmed); Cornell & DeDino, *supra* note 123, at 506 (noting use of loyalty oaths to "deal with the potential threat coming from armed citizens who remained loyal to Great Britain").

139 *See* CRAMER, *supra* note 114, at 28 ("Many of the indentured servants were Irish, suffering from 'incorrigible rudeness and ferocity,' and of suspect loyalty in a war against a European foe." (quoting PHILLIP ALEXANDER BRUCE, 2 INSTITUTIONAL HISTORY OF

the disarmament of groups associated with foreign elements. On this reading, the right to bear arms exists precisely because of foreign influences in the American polity, and the Second Amendment gives constitutional imprimatur to Americans' xenophobia. Exclusion of noncitizens from arms bearing, when citizenship is used as a proxy for loyalty, has been and can be continually justified by this formative ethic.

Arguably then, at least from this early understanding, *Heller*'s restriction of gun rights to citizens stands on firm historical ground. The specific type of foreign element at issue, however, limits the modern-day utility of this justification for noncitizen disarmament. In addition to distinguishing gun possession as an American "advantage,"[140] James Madison critiqued the monarchical and "tyrannical" governments of Europe for not trusting their constituents with arms.[141] Living under such regimes, those foreigners could not be expected to understand, to respect, or to be trusted to defend the republican institutions of America or the freedoms and liberties enjoyed by long-time residents and supporters of the new states. The international order, however, has changed drastically from Madison's time. Construing the Second Amendment's exclusion of foreigners in light of *The Federalist Papers* suggests that the fundamental issue underlying mistrust of noncitizen gun possession was their inexperience and unfamiliarity with democracy and democratic institutions. Such caution made sense in an international order with one fledgling democracy, but, today, most nation-states are ostensibly democratic regimes.[142] Thus, while initially attractive as a justification for present-day noncitizen firearm prohibitions, early understandings of the arms right do not survive evolutions in international governance.

This "lone-democracy" syndrome of the framers also explains the relationship between firearms and voting at the founding. Both were rights of "First-Class Citizens"[143] and could be denied to most Blacks,

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VIRGINIA IN THE SEVENTEENTH CENTURY 7 (1910)); KENNETT & ANDERSON, *supra* note 114, at 49 ("In the aftermath of the Antinomian controversy in 1637, the Massachusetts leaders ordered seventy-six followers of Anne Hutchinson and the Reverend John Wheelwright disarmed."); Churchill, *supra* note 120, at 157 (noting disarmament of Catholics unwilling to swear undivided allegiance to the "Hanoverian dynasty and to the Protestant succession").

140 *See* THE FEDERALIST NO. 46, *supra* note 134, at 238 (James Madison).

141 *Id.* ("[I]t is not certain that with [firearms] alone they would not be able to shake off their yokes.").

142 *See* Daniel Griswold, *Globalization, Human Rights, and Democracy*, EJOURNAL USA (Feb. 1, 2006), http://www.america.gov/st/econ-english/2008/June/20080608100830xjyrreP5.512637e-02.html ("[T]he percentage of the world's governments that are democracies has reached 64 percent, the highest in the 33 years of Freedom House surveys.").

143 For a discussion of this concept, see *supra* note 127 and accompanying text.

women, and aliens. In other words, both were privileges and tools of self-governance, and only those capable of understanding democratic values were capable of wielding the vote and the gun.[144] That both were denied even to some citizens is indicative of the founding-era lawmakers' comfort with the disaggregation of fundamental political rights from the concept of citizenship. Citizenship itself was racially defined, but not all citizens could be entrusted with all rights. In an era when some white citizens could not access core political rights, citizenship mattered more as a rank with symbolic meaning than as a rights repository.[145] Since only a select class—John Jay's "unified people"—could, as a matter of right, vote and own guns, legislatures found it unnecessary to use citizenship as a method of excluding undesirables. Over time, however, citizenship and important rights, including the right to bear arms, converged.

Dred Scott v. Sanford confirmed this convergence by ensuring that important rights would be tied to citizenship and that citizenship would remain racially exclusive.[146] *Dred Scott* expressly equated disarmament with enslavement and lack of citizenship. Thus the transitive logic of race, citizenship, and firearms developed during the early days of the republic—only whites could be citizens, only citizens could own guns, ergo only whites could own guns—crystallized with *Dred Scott*.[147] While overruled by the Fourteenth Amendment and vilified as a low point in American jurisprudence, the case reveals a great deal about the relationships among race, citizenship, and firearms.

On the central question presented by *Dred Scott*, the Court ruled that as a "descendant[ ] of Africans who were imported into this country, and sold as slaves,"[148] Dred Scott could not be a citizen of the United States. In reaching its conclusion, the Court, for the first time, expressly equated "the people" in the Constitution with citizens of the United States: "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Govern-

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144 AMAR, *supra* note 102, at 161 ("In a society that saw itself under siege after Nat Turner's rebellion, access to firearms had to be carefully restricted, especially for free blacks."); Konig, *supra* note 113, at 139 (explaining desire for militia to consist of citizens and especially property holders).

145 *See* Stephen H. Legomsky, *Why Citizenship?*, 35 VA. J. INT'L L. 279, 291 (1994) (considering different reasons for concept of citizenship, including its symbolic content).

146 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 421 (1856) (noting "uniform course of legislation" that "marked and stigmatized" free Blacks and slaves and using this course of legislation as evidence that free blacks and slaves were not perceived as "citizens").

147 *Id.* at 416–17.

148 *Id.* at 403.

ment through their representatives."[149] Compounding this restrictive definition, Chief Justice Taney proceeded to paint a racially homogenous view of "the people," justifying racially exclusive citizenship by noting that if blacks could be U.S. citizens, courts would have to permit them all the attendant rights: "It would give to persons of the negro race . . . the right to . . . go where they pleased at every hour of the day or night without molestation, . . . the full liberty of speech . . . [the right] to hold public meetings upon political affairs, and *to keep and carry arms wherever they went*."[150]

Within the course of a few paragraphs, *Dred Scott* modified the content of citizenship and the meaning of arms bearing. While the opinion's musings about the racial composition of citizenry were squarely dismissed by the Fourteenth Amendment's Citizenship Clause,[151] other aspects of the opinion appear to have exerted lasting influence. First, the opinion gave weight to the interpretation of "the people" as limited to "citizens." Although *United States v. Verdugo-Urquidez*[152] casts doubt on such a restricted reading, *Heller*'s return to political membership as the lynchpin of "the people" suggests *Dred Scott*'s continued relevance. Second, although citizenship was only loosely associated with political rights such as voting, jury service, and arms bearing in the republic's early years,[153] *Dred Scott* imbued citizenship status with significant heft, enumerating it as the legal category that triggered fundamental rights.

Finally, the case represents the first time the Supreme Court opined on the nature and importance of the right to bear arms in a postrevolutionary society. Tellingly, Justice Taney employs the simple logic of the danger posed by a gun-wielding, free-moving, racialized noncitizen to infer a personal safety imperative for citizens in the Second Amendment:

> It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States, and exercised so much influence

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149 *Id.* at 404.

150 *Id.* at 417 (emphasis added).

151 U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

152 494 U.S. 259, 265 (1990) (asserting that "the people" refers to persons part of national community or those who have "developed sufficient connection" with that community to be considered part of it); *see infra* Part I.A (discussing how *Heller*'s understanding of "the people" contradicts *Verdugo-Urquidez*'s interpretation of the same phrase).

153 *See* AMAR, *supra* note 102, at 48–49 (distinguishing between political rights held by elite class of "First-Class Citizens," and general civil rights held by other members of polity, including women and certain white aliens).

> in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.[154]

Emblematic of a judicial trend in citizenship and alienage discussions persisting even in the present day, the opinion assumes the dangerousness of noncitizens without offering any empirical support before the Court.

Thus, *Dred Scott* continued the tropes of gun ownership that took root in the founding era while also creating a novel overlap between citizenship and gun rights. The case reaffirmed the congruence between enslavement and disarmament, as it simultaneously kept Scott in servitude and denied him firearms privileges. In addition, it reaffirmed fear of gun ownership by a sinister and foreign "Other."[155] Unlike the foreigners with whom founding-era lawmakers were concerned—British loyalists, and southern and eastern Europeans unaccustomed to republican institutions—the midnineteenth-century Court focused on foreigners who were even more remote to the political community:[156] noncitizens who, while living under a republican government, posed too great a danger to the citizen population to own guns.[157] And since *Dred Scott* began with the premise that citizenship was highly substantive, it took the corollary position that citizenship was racially exclusive.

Of course, during this era—indeed throughout the nineteenth century and into the 1920s—*some* aliens were permitted to vote in *some* states. Although this fact complicated citizenship's post–*Dred Scott* status as the storehouse of important rights such as arms bearing, the concomitant racial exclusions in alien suffrage reaffirmed prevailing conceptions of who exactly was capable of exercising self-sovereignty. The aliens that could vote under these various statutes were specific white aliens, and so, just like the founding era, rights of

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154 *Dred Scott*, 60 U.S. at 417.

155 *See supra* note 111 and accompanying text.

156 As commentators have argued, nineteenth-century slave laws acted as immigration laws, in many ways. *See* Carbado, *supra* note 111, at 640–45 ("Slavery was a kind of forced naturalization, a process in which blacks were simultaneously denationalized from Africa and domesticated to (but never fully incorporated in) America. *Dred Scott* was the key case in enacting this denationalization and domestication."). Also note that the persistence of slavery is often credited with forestalling any federal immigration laws, as slave states were concerned that federal regulation of immigration would inevitably impact slavery. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1865–73 (1993). The first federal immigration bills appear only after the end of chattel slavery. *Id.* at 1887 n.347.

157 Cottrol & Diamond, *supra* note 17, at 335–36 ("The idea was to restrict the availability of arms to blacks, both slave and free, to the extent consistent with local conceptions of safety.").

suffrage and arms bearing were intimately tied to race. However, the post–Civil War legal disconnect between citizenship and race ushered in a new era of gun regulation intended to limit noncitizen and minority gun rights.

B. Guns and Citizens from Reconstruction to the Early Twentieth Century

Significant upheavals in the laws of gun ownership and citizenship began when the Court overruled *Dred Scott* and expanded the definition of citizenship to include non-whites. Lack of gun rights transformed from a distinction separating the enslaved from the free into a marker of inferior citizenship. As citizenship became racially inclusive, and as racially varied foreigners began entering the country in greater numbers, efforts to restrict immigration and proscribe gun rights also increased.[158] Significant immigration and its attendant social dislocations coincided with gun regulations intended to prohibit noncitizen ownership. These regulations were based on stereotypes regarding the violent and anarchic tendencies of southern and eastern European, Asian, and Latino immigrants. Finally, as immigration and citizenship became more racially diverse, state law undermined the ability of nonwhites to access citizenship rights. While the Fourteenth Amendment guaranteed equal rights to all citizens (and persons) in theory, in practice, post–Civil War Black Codes relegated many new citizens to inferior membership status. Concurrently, racial bars to naturalization and the persistence of state alien-in-possession statutes allowed citizenship to remain a repository for important rights as long as the law explicitly and implicitly denied access to full political and civil membership to disfavored persons.

Although the Fourteenth Amendment nullified *Dred Scott*, neither it nor the abolitionist movement challenged the opinion's basic logic that the legal status of citizenship should trigger significant rights. Instead, by arguing that citizenship and, consequently, arms bearing, should include more than the white citizenry, the abolitionist movement, culminating in the Fourteenth Amendment, reified *Dred Scott*'s linkage between citizenship and rights.[159] By abolishing slavery

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158 KENNETT & ANDERSON, *supra* note 114, at 167 ("Added to this rising concern was a disturbing and alien element. The public had always been sensitive to the dangers of armed minorities such as blacks and Indians, but this concern took on new dimensions as cities filled with unassimilated masses of immigrants from southern and eastern Europe.").

159 *See* AMAR, *supra* note 102, at 262–63 ("[A]ntislavery theorists emphasized the personal right of all free citizens—white and black . . . to own guns for self-protection."); Robert E. Shalhope, *The Right To Bear Arms: A View from the Past*, 13 REV. AM. HIST. 347, 348 (1985) ("These abolitionists integrated the right of the citizen to bear arms into their theory of 'national citizenship.'").

and expanding the racial inclusiveness of citizenship, the Reconstruction Amendments had the consequence of allowing, at least in theory, newly minted black citizens to bear arms. Accordingly, southern states were readmitted to the union after the Civil War on the express condition that they provide all persons the "full and equal benefit of all laws and proceedings for the security of persons and property,"[160] and the Freedmen's Bureau Act of 1866 contained a specific guarantee of arms rights regardless of color.[161]

Soon after the Fourteenth Amendment required the recognition of blacks as citizens, the Supreme Court in *United States v. Wong Kim Ark* ruled that Chinese persons born within the nation's territorial boundary were citizens by virtue of the Fourteenth Amendment as well.[162] These constitutional revolutions dismantling the racial exclusiveness of citizenship spurred both firearms restrictions aimed at disarming these new citizens and federal immigration limitations designed to repel other racial demographics from joining the American polity. The Chinese Exclusion Act of 1882 suspended the immigration and naturalization of persons of Chinese birth and ancestry entirely.[163] As professors Robert Cottroll and Raymond Diamond have documented, various black codes in Reconstruction America specifically regulated the type and manner of black gun ownership.[164]

The constitutional expansion of citizenship's racial portfolio and swift federal action to limit racially diverse foreigners from entering the country galvanized states to limit important rights associated with citizenship—including arms bearing—to white citizens. Indeed, the two foundational Supreme Court firearms cases of the postbellum period—*United States v. Cruikshank*[165] and *Presser v. Illinois*[166]—were in essence, respectively, race and immigration cases.[167] Osten-

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160 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

161 Freedmen's Bureau Act of 1866, ch. 200, § 14, 14 Stat. 173, 176–77 ("[I]n every State or district . . . the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery.").

162 169 U.S. 649, 688 (1898) ("The effect of the enactments conferring citizenship on foreign-born children of American parents has been defined . . . since the adoption of the Fourteenth Amendment of the Constitution.").

163 Act of May 6, 1882, Pub. L. No. 47-126, § 1, 22 Stat. 58, 58 (suspending immigration from China); *id.* § 14, 22 Stat. at 61 (barring Chinese from obtaining U.S. citizenship).

164 Robert J. Cottrol & Raymond T. Diamond, *"Never Intended To Be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1324–27 (1995).

165 92 U.S. 542 (1875).

166 116 U.S. 252 (1886).

167 Importantly, as Rebecca Hall and Angela Harris note, while prevailing commentary understands *Cruikshank* to be a "race" case, we should recognize that it is also a case

sibly, the cases dealt with the constitutional principle and structural norm of federalism, with the Court in each case upholding the respective state gun and militia statutes by ruling that the Second Amendment limited only federal law making.[168] A closer look at the facts of these oft-cited gun cases, however, illustrates the pervasive struggle to understand how gun ownership could and should relate to citizenship.

The *Cruikshank* opinion devotes only a paragraph to the Second Amendment before dismissing its applicability based on the fact that only state law was at issue in the case.[169] The case itself, however, originated from the brutal "Colfax Massacre" in Louisiana, in which a racially charged armed conflict erupted between blacks and a white mob in the wake of a disputed election.[170] Notably, the victims carried firearms specifically to protect themselves while vindicating their political rights.[171] During the violence, blacks were disarmed and forced to surrender by the white mob.[172] Sources indicate, however, that even after surrender, several dozen blacks were murdered by whites with firearms.[173] Contemporary commentary understood the perpetrators' actions as motivated by self-defense and presumed,

about the attempts of black women to defy both gender and racial subordination. Rebecca Hall & Angela P. Harris, *Hidden Histories, Racialized Gender, and the Legacy of Reconstruction: The Story of* United States v. Cruikshank, *in* WOMEN IN THE LAW STORIES (Elizabeth M. Schneider & Stephanie M. Wildman, eds., forthcoming 2010).

168 *Cruikshank*, 92 U.S. at 553 ("The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress."); *Presser*, 116 U.S. at 265 ("But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States." (citing *Cruikshank*)).

169 *Cruikshank*, 92 U.S. at 553.

170 *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 550–51 (2002) (discussing election dispute leading to Colfax Massacre); LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION 117–20 (2008) (same).

171 *See* Hall & Harris, *supra* note 167; NAT'L PARK SERV., U.S. DEPT. OF THE INTERIOR, CIVIL RIGHTS IN AMERICA: RACIAL VOTING RIGHTS 10 (2009), *available at* http://www.nps.gov/history/nhl/themes/VotingRightsThemeStudy.pdf; *see also* KEITH, *supra* note 170, at 95–96.

172 Hall & Harris, *supra* note 167.

173 *Id.* ("They also shot nearly fifty Black men, who had surrendered."); *see also* McDonald v. City of Chicago, No. 08-1521, slip op. at 9 (U.S. June 28, 2010) ("Dozens of blacks, many unarmed, were slaughtered by a rival band of armed white men [in the Colfax Massacre]. Cruikshank himself allegedly marched unarmed African-American prisoners through the streets and then had them summarily executed." (footnotes omitted)); *McDonald*, slip op. at 4 (Thomas, J., concurring in judgment) ("[In *Cruikshank*], the Court held that members of a white militia who had brutally murdered as many as 165 black Louisianians congregating outside a courthouse had not deprived the victims of their privileges as American citizens to peaceably assemble or to keep and bear arms.").

without evidence, the dangerousness of the black protestors.[174] Although *Cruikshank* held that the Second Amendment is not incorporated against the states, the case resulted in the dismissal of indictments against white defendants accused of disarming and assaulting black political protesters.

Similarly, *Presser*, decided approximately eleven years after *Cruikshank*, reaffirmed *Cruikshank*'s federalism ruling regarding state regulation of firearms.[175] Here, the Court dismissed a challenge to the constitutionality of an Illinois law that regulated when and how militia organizations could drill, train, and march.[176] The challengers, ethnic German workers, lost their appeals and remained convicted under state law.[177] At issue was their creation of a militia organization known as the "*Lehr und Wehr Verein*" (Education and Defense Association) to protect the mostly eastern European labor class, many of whom were recently immigrated, from corporate security forces and the state national guard.[178] Some members of *Lehr und Wehr Verein* also advocated socialism.[179] The defendants were arrested and convicted when, during one of their training drills, they marched on Chicago streets with their firearms.[180] Notably, the defendants were acting as part of a private militia, training specifically to protect themselves from ethnic-oriented violence and repression.

In both *Cruikshank* and *Presser*, the Court's rulings likely were correct statements of then-contemporary constitutional power-sharing principles. As Professor Leti Volpp reminds us, even though gun violence in both cases was perpetrated by private forces, at least in part, "[s]imply because the state does not officially sponsor an activity does not mean that the state does not bear a relationship to that activity."[181] Thus, in affirming the structural principle of federalism, the Court acquitted an armed white mob that had disarmed and killed blacks and convicted immigrant workers who displayed their firearms.

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[174] *Id.* (describing racial paranoia of defendants as motivating their violence).

[175] *Presser*, 116 U.S. 252, 265 (1886); *see* NRA of America v. City of Chicago, 567 F.3d 856, 858 (7th Cir. 2009) ("*Presser* and *Miller* reaffirmed [*Cruikshank*'s holding] that the Second Amendment applies only to the Federal Government." (internal quotations and citation omitted) (alteration in original)), *rev'd sub nom.* McDonald v. Chicago, No. 08-1521, slip op. (U.S. June 28, 2010).

[176] *Presser*, 116 U.S. at 266–68.

[177] *Id.* at 269 (affirming judgment of Illinois Supreme Court).

[178] Stephen P. Halbrook, *The Right of Workers To Assemble and To Bear Arms:* Presser v. Illinois, *One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. 943, 947–48 (1999).

[179] *Id.* at 948.

[180] *See, e.g.*, *The Lehr und Wehr Verein*, N.Y. TIMES, July 20, 1886, at 5 ("[T]he Lehr und Wehr Verein, then 40 strong, paraded in the streets of Chicago armed with rifles.").

[181] Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1583 (2002).

By so doing, the Supreme Court reified the exclusivity of firearms and violence as tools for white citizens during the Reconstruction period into the turn of the century. Moreover, in this same period, *Dred Scott*'s notion of citizenship as an exclusive rights repository came under significant pressure. Both the continuance of noncitizen voting privileges in some jurisdictions[182] and state legislative efforts to keep firearms from newly recognized, nonwhite citizens eviscerated the significance of citizenship for disfavored groups. In addition, these legislative efforts and Supreme Court decisions undermined the Fourteenth Amendment's ideal of including persons of disparate racial, ethnic, and national groups as full members of the political community.

While thinly disguised, racially discriminatory gun laws proliferated during Reconstruction,[183] the turn of the twentieth century brought increased regulation of noncitizen ownership. The end of the 1800s and the early decades of the 1900s witnessed the rise of labor unions and the anarchist movement, both intimately associated with foreign ideologies and the increase of foreign-born persons in the United States.[184] Fueling these fears, the firearm-aided assassination of President McKinley in 1901 was mistakenly thought to be the work of a noncitizen, immigrant anarchist.[185] Although the assassin turned out to be a U.S. citizen by his birth in the United States, the years following the incident witnessed the 1902 renewal of the Chinese Exclusion Acts,[186] and the passage of the 1903 Alien Immigration Act, the latter of which prevented "anarchists" from entering or gaining citizenship.[187] Concurrent with entry restrictions on dangerous for-

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182 *See* Aylsworth, *supra* note 85, at 114–16 (detailing alien voting privileges for specific white aliens in several states throughout nineteenth century and into twentieth century).

183 *See* Cottrol & Diamond, *supra* note 164, at 1324–49 (describing Black Codes, Jim Crow laws, and postbellum regulation of race and guns).

184 KENNETT & ANDERSON, *supra* note 114, at 167 ("Added to this rising concern was a disturbing and alien element. . . . Marxism crossed the Atlantic; anarchism came too, producing a series of violent incidents that culminated in the assassination of President William McKinley. The swarthy, hirsute, and wild-eyed anarchist became the new shibboleth.").

185 *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 166 (6th ed. 2008) ("In a new wave of xenophobia that followed the assassination of President McKinley by an anarchist mistakenly believed to be an immigrant . . . ."). In fact, the assassin, Leon Czologosz, was an American citizen, made so by his birth in Michigan. A. WESLEY JOHNS, THE MAN WHO SHOT MCKINLEY 36 (1970). He was, however, influenced by anarchist teachings. *Id.* at 122–23.

186 Act of May 6, 1882, Pub. L. No. 47-126, 22 Stat. 58; *see also* MICHAEL E. MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920, at 212 (2003) (discussing renewal of Chinese Exclusion Act and Immigration Act of 1903).

187 Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213.

eigners, many citizens began attributing the increased urban violence in New York City to racial minorities and recent immigrants from southern Europe.[188] While immigration generally causes social dislocations,[189] popular sentiment at the time attributed the urban gun violence specifically to the innate proclivities of the new wave of immigrants, whose violence was of a different character than that of Anglo-Saxon immigrants of the past.[190]

Given this backdrop of xenophobia and racial fear, it is no accident that significant state and federal gun laws emerged at the same time as large-scale immigration and the nation's first comprehensive immigration laws. Both sets of statutes—firearms and immigration restrictions—regulated dangerous elements in American society.[191] Representative of these conjoined suspicions is *In re Rameriz*, a 1924 case challenging the constitutionality of California's criminalization of noncitizen gun possession.[192] The defendant, Mr. Rameriz, was convicted under California law for being a noncitizen in possession of a firearm.[193] Relying on *Cruikshank* and *Presser*, *Rameriz* rejected the immigrant-defendant's Second Amendment challenge, instead focusing its analysis on why the statute withstood equal protection claims.[194] Unsurprisingly, the California Supreme Court relied on prevailing stereotypes regarding immigrants' propensity for violence and dangerousness to the citizen population to justify the statute's alienage discrimination.[195] Contemporaneous accounts of the statute's

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188 *See Concealed Pistols*, N.Y. TIMES, Jan. 27, 1905, at 6 ("[Prohibiting concealed pistols] would prove corrective and salutary in any city filled with immigrants and evil communications, floating from the shores of Italy and Austria-Hungary. New York police reports frequently testify to the fact that the Italian and other south Continental gentry here are acquainted with the pocket pistol . . . .").

189 Weisberg, *supra* note 3, at 18 ("Of course, social dislocations associated with immigration probably caused some increases in crime and violence, but in a way consistent with this overall picture. Most typically, immigrants cause a brief increase in crime until they are assimilated—unless they bring 'civilization' with them.").

190 *See* KENNETT & ANDERSON, *supra* note 114, at 167 ("With the foreigner came alien ideas that altered the traditional pattern of violence.").

191 *See, e.g.*, Leti Volpp, *"Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship*, 5 CITIZENSHIP STUD. 57, 63–66 (2001) (describing popular attitudes and state treatment of persons of Chinese and Japanese descent).

192 *In re* Rameriz, 193 Cal. 633, 641–42 (1924) (evaluating constitutionality of statute that declared "no unnaturalized foreign born person . . . shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person"), *abrogated by* People v. Rappard, 28 Cal. App. 3d 302 (1972).

193 193 Cal. at 652.

194 *Id.* at 644–52 ("The question presented here is whether, in the exercise of the police power, the segregation of aliens constitutes an unlawful discrimination against that class.").

195 *Id.* at 642 ("While such a danger [of armed noncitizens attacking the government] may seem improbable at the present time, yet, in the time of war, it becomes very real danger indeed, particularly as a few thousand organized aliens . . . could so cripple our

enactment link citizenship with race and reveal the law's true intent and purpose—to prevent gun possession by Asian and Latino immigrants.[196] In addition to California, New York enacted an alien-in-possession prohibition in 1905,[197] and Pennsylvania's restriction on noncitizen gun use passed constitutional muster under the Supreme Court's analysis in *Patsone v. Pennsylvania*.[198]

Similarly, even statutes that regulated types of firearms—as opposed to who could own or use them—were motivated by fears of immigrant violence. The most prominent and well-studied law of this genre was New York's Sullivan Law, passed in 1911.[199] Ostensibly, the law regulated a type of cheap, easily available class of handguns—manufactured in foreign countries—known popularly as the "Saturday Night Specials."[200] However, contemporaneous news accounts and commentary reveal an underlying legislative motive to keep firearms out of the hands of recently immigrated Italian migrants in New York City.[201] The type of gun at issue was closely associated with Italian immigrants, the poor, and other racial minorities in urban areas, and legislators were convinced of the inherent propensity of those groups to armed violence.[202]

These gun regulations came into force in the context of larger social, political, and legal movements influenced by immigration. Legislatures in California, Pennsylvania, and New York enacted their respective gun laws shortly after the United States experienced the highest percentage of foreign-born persons ever recorded.[203] The influx of immigrants from southern and eastern Europe and Asia,

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basic industries and our transportation facilities as to make us practically powerless in conducting war.").

196 *Id.*; *see also* KENNETT & ANDERSON, *supra* note 114, at 173 (discussing crime wave attributed to Asian and Italian immigrants).

197 KENNETT & ANDERSON, *supra* note 114, at 178.

198 232 U.S. 138 (1914). I chose California, New York, and Pennsylvania as representative states because of their significant general populations and sizable immigrant populations. But note that in at least one state, the highest court struck down the state's alien gun prohibition. *See* People v. Nakamura, 62 P.2d 246, 247 (Colo. 1936) (striking down alienage restriction in state gun law because it deprived aliens of right to defend themselves and their property).

199 Act of May 25, 1911, ch. 195, 1911 N.Y. Laws 442 (codified at N.Y. PENAL LAW § 265.01(5) (McKinney 2008)).

200 *See* Cottrol & Diamond, *supra* note 164, at 1334–35 & n.174 (discussing "Saturday Night Specials").

201 *See supra* note 188.

202 *See* KENNETT & ANDERSON, *supra* note 114, at 167, 173 (discussing popular conceptions regarding propensities of minorities to engage in violence).

203 The highest percentage of foreign-born individuals in the United States occurred in 1890 when 14.8% of the population was foreign-born. In 1910, the foreign-born made up 14.7%. *See* CAMPBELL J. BROWN & EMILY LENNON, U.S. BUREAU OF THE CENSUS, HISTORICAL CENSUS STATISTICS ON THE FOREIGN-BORN POPULATION OF THE UNITED

alarm over the potential presence of anarchist and socialist political parties, and fears about the criminality of immigrants led to the first comprehensive federal immigration law in the 1920s.[204] Although the federal government had long practiced Chinese exclusion,[205] Congress banned all immigrants from Asia in 1917 after having previously barred Asian immigrants from naturalizing into citizens.[206] The 1924 immigration law limited immigration from a number of disfavored regions while favoring inflow from northern and western Europe.[207] Combined with the firearms restrictions emerging during the same period, the effect was clear: to limit dangerous foreigners' ability to enter the country, curtail the ability of those already here to become full members of the political community, and deprive those already here of the ability to bear arms, either for defense from, or protest against, the citizen population.[208]

Along with heralding major immigration limitations on Asian and other disfavored foreigners, the mid-1920s also marked the end of noncitizen voting in the United States.[209] Noncitizens—more specifically, white noncitizens—had been permitted to vote in a number of states in the mid-1800s and beyond.[210] But when the Fourteenth and Fifteenth Amendments jeopardized the validity of such racial distinctions in voting, as Asians, Blacks, and others became potential citizens, and as immigration rapidly increased from non-Western

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STATES: 1850–1990, (Feb. 1999) [hereinafter HISTORICAL CENSUS STATISTICS], *available at* http://www.census.gov/population/www/documentation/twps0029/twps0029.html.

204 ALEINIKOFF ET AL., *supra* note 185, at 170–71 (discussing the Immigration Act of 1924).

205 *Id.* at 164.

206 *See supra* note 163 and accompanying text (discussing Chinese Exclusion Act).

207 ALEINIKOFF ET AL., *supra* note 185, at 170–71 ("The goal of the bill . . . was to ensure that northern and western Europeans still had access to the United States while southern and eastern European immigration would be restricted.").

208 *Id.* at 165; *cf.* State v. Mendoza, 920 P.2d 357, 366–67 (Haw. 1996). *Mendoza* chronicles how this same unsubstantiated fear of noncitizen violence permeated Hawaii's Constitutional Convention and discussion of the state's nascent right to bear arms provision. Focused exclusively on danger to citizens from noncitizens' gun possession, one of the delegates argued:

> You'll find in history that it is the illegally armed minority that actually we're faced with as far as the trouble is concerned. The legally armed majority are [sic] the ones that should have the right to protect themselves and I believe that this [state constitutional] provision [ensuring gun rights only to citizens] gives it to them.

Id. (statement of Representative Bryan). In response, others took the view that as a civil right of self-defense, noncitizens had just as much cause to own guns as citizens. *Id.* at 367 (statement of Representative Fukushima).

209 Aylsworth, *supra* note 85, at 114; *see also* Raskin, *supra* note 85, at 1397–98 (noting prevalence of noncitizen voting in U.S. legal history).

210 Raskin, *supra* note 85, at 1397.

European sources, all states that had previously allowed noncitizen voting repealed their laws and enacted citizen-only suffrage provisions.[211] Voting and arms bearing, once linked as rights of "First-Class Citizens,"[212] had at once become more widely dispersed (by the increased inclusiveness of citizenship) and more narrow (by the exclusion of noncitizens from both). Their coupling in early American history highlights the democratizing potential of both. Thus, two prominent agents of political and social change from the revolutionary era—the ballot and the bullet—remained concentrated in the hands of the predominantly white citizenry by the early twentieth century.

C. Guns and Citizens from the Civil Rights Era to the Obama Presidency

These representative events, opinions, and legislative acts of the Early Republic, the Reconstruction, the post-Reconstruction era, and the early twentieth century showcase the dark history of overt race and alienage-based gun restrictions. The constitutional revolution of the mid-twentieth century, however, led to increasing judicial scrutiny for covert and overt discrimination.[213] In addition, Congress repealed racial bars to naturalization,[214] and the citizenry strayed far away from John Jay's conception of a homogenous "unified people."[215]

In light of this constitutional evolution, the elimination of the underlying racial distinctions and the expanded availability of citizenship could potentially justify *Heller*'s understanding of "the people" as "citizens." However, even as citizenship became racially heterogeneous, and judicial pronouncements mandated equal rights, guns remained a divisive marker of race and citizenship. First, as with the post–Civil War period, gun prohibitions persisted as a marker of second-class or inferior citizenship. Second, the danger to the citizen population from immigrants still animated, and animates, firearms law from mid-century to present day. And finally, the dynamic and indeterminate connections among guns, citizenship, and race keep the content of citizenship in flux. Given the persistence of these themes, even

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211 Aylsworth, *supra* note 85, at 114.

212 *See supra* note 127 and accompanying text (discussing Amar's concept of "First-Class citizens").

213 *See* Korematsu v. United States, 323 U.S. 214 (1944) (upholding military order for internment of Japanese but noting that racial classifications require heightened judicial scrutiny); Graham v. Richardson, 403 U.S. 365 (1971) (striking down alienage distinctions in state welfare law, relying on, in part, heightened judicial scrutiny).

214 ALEINIKOFF ET AL., *supra* note 185, at 174–75 (discussing John F. Kennedy's commitment to abolishing national origins quota system, which culminated in its repeal in the Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911).

215 *See* THE FEDERALIST NO. 2, *supra* note 134, at 15 (John Jay).

after the Court's landmark equal protection decisions on race and alienage, firearms restrictions continue to expose the significant problems of limiting "the people" to citizens.

Throughout the mid-twentieth century, gun statutes like the California alien-in-possession prohibition upheld in *In re Rameriz* used citizenship status as a proxy for racial exclusion.[216] Such laws remained viable because federal law prevented entire racial groups from naturalizing until the passage of the Immigration and Naturalization Act in 1952.[217] In addition, the Supreme Court's modern race and alienage jurisprudence had yet to take root. In the same period during which *Rameriz* allowed explicitly prejudicial and stereotypical misconceptions of immigrants to suffice as reasons for keeping guns away from immigrants, inchoate notions of danger to the white population from racial minorities in the civil rights movement appear to have influenced firearms purchases and regulation in the 1960s.

During the slavery era, the number of guns in white hands and the number of slaves were seen as being directly proportional; as a slave owner increased his population of slaves, he was obliged to provide more guns to white militia members as a safety measure against the "public hazard" of more black bodies.[218] The mid-twentieth century civil rights movement prompted members of the white majority to adopt a similar calculation. As minorities began protesting, marching, and engaging in other acts of civil disobedience in pursuit of equal rights, gun sales began to increase steadily.[219] From a steady

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[216] *See supra* notes 192–95 (discussing *Rameriz* decision). Although the state employed a citizenship distinction, contemporaneous commentary focused on the perceived dangerousness of certain racial groups. *See, e.g.*, S.F. CHRON., Jul. 15, 1923, at 3, *available at* http://www.claytoncramer.com/primary/other/1923ConcealedWeaponsLaw.jpg (noting that "[i]t was largely on the recommendation of R.T. McKissick, President of the Sacramento Rifle and Revolver Club, that Governor Richardson approved the measure" because it would have "[a] salutary effect in checking tong wars among the Chinese and vendettas among our people who are of latin descent").

[217] ALEINIKOFF ET AL., *supra* note 185, at 173 (noting Immigration and Nationality Act's repeal of Japanese exclusion provisions).

[218] CRAMER, *supra* note 114, at 37 ("Slaves were a kind of public hazard; if a master wished to buy more slaves, he was obligated to provide white members of the militia.").

[219] DEP'T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, COMMERCE IN FIREARMS IN THE UNITED STATES A-3 to -5 (2000) [hereinafter COMMERCE IN FIREARMS]. These figures were assembled by calculating the U.S. production, as measured by manufacturers' shipments, plus U.S. imports, minus U.S. exports of firearms. From 1968 to 1969, there was a small drop in firearms sales attributable to the enactment of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. *See* Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 167 (1975) ("Handgun imports in 1969, the first year under the Gun Control Act, were less than a third of 1968's record volume . . . ."). Amongst other things, this Act limited the importation of foreign-made "Saturday Night Specials" into the United States, which depressed

state of roughly 2 million guns sold per year between 1947 and 1961, sales rose to 5 million in 1968 and remained high through 1974.[220] A number of causative factors may explain this significant increase in gun possession, including a marked rise in violent crime.[221] However, the coincidence of the rise in gun purchasing also indicates that unrest in the constitutional and social order temporally correlated to a significant arming of the white citizenry.[222]

This general arming of the white population during the constitutional revolution of the mid-twentieth century was accompanied by legislation that disproportionately affected racial minorities. Congress passed major comprehensive firearm regulation in 1968, in the wake of the civil rights skirmishes, crime rate increases, and the assassinations of President Kennedy, Martin Luther King, Malcolm X, and Robert F. Kennedy.[223] Ostensibly a regulation of all guns, the Act was understood by contemporary commentators to have as an underlying concern the cheaper and more accessible firearms that were most likely to be purchased in urban areas.[224] Since the urban communities were disproportionately populated by racial minorities, the Gun Control Act of 1968 also disproportionately disarmed racial minorities as putative gun owners.

In addition, Congress passed the Act two years after the formation of armed resistance groups such as the Black Panther Party (originally named the Black Panther Party for Self-Defense).[225] The Black

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imported firearms. *See generally id.* at 170–73 (discussing how depression of imported handguns led to an increase in production of domestic "Saturday Night Specials"). Outside this one year aberration, there was a steady rise in gun sales until 1974, when 6.4 million firearms were purchased in the United States. COMMERCE IN FIREARMS, *supra*, at A-3 to -5; *see also* KENNETT & ANDERSON, *supra* note 114, at 220 ("In the twenty-two year period from 1946 until the Gun Control Act of 1968, American industry sold some 45 million small arms into the domestic civilian market, as many as it had sold in the preceding half century. During the same period about 10 million imported arms were sold.").

220 COMMERCE IN FIREARMS, *supra* note 219, at A-3 to -5.

221 Note that this may be a consequence of high gun sales as well as a cause. *See, e.g.*, Bogus, *supra* note 113, at 1384 ("Guns fuel [Los Angeles area] violence. More than sixty-six percent of all murders are committed with firearms.").

222 *See* KENNETT & ANDERSON, *supra* note 114, at 224–25 ("With the late 1950s also came a rise in public concern over certain internal problems that did or could involve the gun. *The New Republic* warned as early as 1956 that the growing civil rights controversy was causing tremendous sales of firearms in southern communities.").

223 The Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–929 (2006)); *see also* Zimring, *supra* note 219, at 147–48; 1 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW 238–39 (Gregg Lee Carter ed., 2002) [hereinafter 1 GUNS IN AMERICAN SOCIETY].

224 1 GUNS IN AMERICAN SOCIETY, *supra* note 223, at 238–39 (noting focus of gun control advocates on small, cheap handguns prevalent in poor black neighborhoods).

225 *See id.* at 63–64 ("In California in the mid-1960s, the Panthers began carrying rifles and shotguns openly—as California law allowed—in order, the Panthers claimed, to pro-

Panthers themselves gained their first significant notoriety when they marched on the California capitol in protest of a state gun ban.[226] Similarly, in his manifesto, *Negroes with Guns*, Robert Williams details the furor and fear created by his call to defend black communities with firearms.[227] Notable in Mr. Williams's story is his account of the manner in which law enforcement portrayed his gun use. Combining the major tropes of gun regulation and citizenship, authorities claimed that Williams's firearms were not only illegally held but were also foreign made.[228] Playing to Cold War suspicions, local authorities purportedly claimed that Williams's firearms were from Russian suppliers, thus merging fears of black gun ownership with suspicions of sinister outsiders.[229] The law enforcement response in this case was emblematic of larger measures which had a disproportionate disarming effect on non-whites. Citizens who should have enjoyed all the rights and privileges of citizenship were nevertheless relegated to a diminished membership in the national community.[230]

Fears of racial minorities and racially defined foreigners began conflicting with the emerging constitutional changes of the mid-to-late twentieth century. Undoubtedly, by the latter part of the twentieth century, changes in constitutional law at the Supreme Court level with regard to race, national origin, and alienage changed the way lower courts viewed racial and alienage distinctions.[231] This shift in constitu-

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tect victims of police brutality. The California legislature promptly enacted legislation restricting the carrying of long guns in public places.").

226 Clayborne Carson, *Preface* to THE BLACK PANTHERS SPEAK xi (Philip S. Foner ed., 1970).

227 ROBERT F. WILLIAMS, NEGROES WITH GUNS (Wayne State University Press 1998) (1962).

228 *Id.* at 59–60.

229 *Id.*

230 *See* Bogus, *supra* note 113, at 1366 (questioning whether "gun control impose[s] a disproportionate burden on inner city residents, particularly those in minority communities").

231 There were a number of changes that affected how courts treated legislation which used race and/or alienage categorizations. *See* Graham v. Richardson, 403 U.S. 365, 370–80 (1971) (striking down state welfare laws conditioning benefits on citizenship based on heightened scrutiny and alternatively on preemption grounds). Even if *Graham* is understood to mandate an equal protection inquiry for state alienage distinctions—and not invalidation through preemption analysis—subsequent cases have developed the important political exception to the rules in *Graham*, under which strict scrutiny does not apply to state alienage distinctions with respect to jobs, offices, and positions that go to the heart of a state's governance and sovereign self-definition. *See infra* note 269 and accompanying text. Prior to *Graham*, the Court's understanding of alienage distinctions was based on other judicial doctrines and exceptions. *Compare* Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392, 394 (1927) (sustaining law barring aliens from operation of billiard halls under exception to equal protection law for regulations "passed in the interest of and for the benefit of the public"), *with* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420–21

tional thinking is evidenced in *People v. Rappard*, in which the California Supreme Court struck down the same alien-in-possession statute it had upheld fifty years earlier in *In re Rameriz*.[232] Again, the court decided the issue as an equal protection problem and not as a Second Amendment issue. The court's decision to do so, as well as its reasons for overruling *In re Rameriz*, reveal a great deal about the shift in the polity's increasing interactions with immigrants during the intervening five decades. By the time of *People v. Rappard*, constitutional thinking regarding the viability of alienage distinctions in domestic affairs had radically changed.[233] In 1930, 83% of the foreign-born population hailed from Europe with only 1.9% and 5.6% from Asia and Latin America, respectively.[234] By 1980, only 39% were from Europe, while 19.3% and 33.1% came from Asia and Latin America, respectively.[235] Stricter judicial scrutiny meant that the government had to proffer evidence substantiating the need for non-citizen disarmament; requiring such production led, in instances like *Rappard*, to the discovery that the assumptions regarding the inherent violence and dangerousness of immigrants underlying regulations and judicial opinions were incorrect or hyperbolized.[236]

Categorized by the court as an equal protection issue, the ruling in *Rappard* reveals more about the inevitability of ethnically diverse immigrants in the population than it does about the right to bear arms. As more immigrants from racially varied backgrounds began permanently residing and naturalizing in the United States, prejudices regarding the perceived inability to assimilate and dangerousness of those immigrants presumably waned. Thus, the ruling is more easily explained by evolving attitudes and assumptions about immigrants than it is by the Court's changing conceptions of "the people" protected by the Second Amendment. Moreover, by overruling state gun laws with alienage distinctions on equal protection grounds, courts

(1948) (striking down California law denying aliens fishing licenses and signaling demise of "special public interest" doctrine).

232 People v. Rappard, 104 Cal. Rptr. 535, 537 (Ct. App. 1972).

233 *See supra* note 231.

234 HISTORICAL CENSUS STATISTICS, *supra* note 203, tbl.2, *available at* http://www.census.gov/population/www/documentation/twps0029/tab02.html.

235 *Id.*

236 *See, e.g.*, John Hagen & Alberto Palloni, *Immigration and Crime in the United States*, *in* THE IMMIGRATION DEBATE: STUDIES ON THE ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 367, 372 (James P. Smith & Barry Edmonston eds., 1998) (compiling and analyzing data about immigration waves and crime, indicating that "arrest rates and immigration rates were only weakly if at all related"); ALEINIKOFF ET AL., *supra* note 185, at 164–65 ("Immigrants were statistically more likely to commit minor offenses than were the native born who tended to commit property crimes and crimes of personal violence.").

were able to avoid difficult interpretative problems associated with the scope of the Second Amendment. While equal protection consideration has led to the invalidation of some such statutes,[237] avoidance of Second Amendment challenges has also permitted other courts to use a federal power framework to uphold the same alienage distinctions.[238] Complicating matters further, application of equal protection principles to alienage distinctions is itself unpredictable and depends on whether federal or subfederal entities are legislating.[239]

This bipolarity of more recent alien gun-possession decisions is a symptom of a larger doctrinal debate as to how best to understand governmental action towards noncitizens within the territorial boundary. While equal protection and due process frameworks contemplate noncitizens as potential members of the national community—i.e., as "Americans in waiting"[240]—who deserve significant judicial protection, federal power and preemption frameworks treat noncitizens as outsiders and security threats under the control of the sovereign's foreign policy prerogatives.

This mode of unpredictable adjudication, based on different doctrinal frameworks and incapable of defining who is encompassed within either federal or state constitutional right-to-bear-arms provisions, has led to the current diversity of state alien gun laws.[241] At present, over twenty states have some restriction on noncitizen gun possession. The remaining states appear to regulate without regard to citizenship status. The restrictions in the alienage-conscious states fall into four broad categories: (1) general prohibition of noncitizen possession (with specific exceptions); (2) prohibition of noncitizen concealed carrying; (3) heightened restrictions or more onerous requirements for noncitizen possession (either general or concealed

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[237] *See, e.g.*, Chan v. City of Troy, 559 N.W.2d 374, 375–76 (Mich. Ct. App. 1997) (striking down Michigan's alienage distinction in firearms law as violation of federal equal protection guarantee).

[238] *See, e.g.*, State v. Vlacil, 645 P.2d 677, 679–81 (Utah 1982) (upholding Utah's ban on alien gun possession against federal and state constitutional guarantees of right to bear arms and federal preemption challenges); State v. Hernandez-Mercado, 879 P.2d 283, 286–90 (Wash. 1994) (upholding Washington's alienage distinction in firearms law against both preemption and equal protection challenges).

[239] *Compare* Mathews v. Diaz, 426 U.S. 67 (1976) (upholding alienage distinctions in federal welfare law), *with* Graham v. Richardson, 403 U.S. 365 (1971) (striking down alienage distinctions in state welfare law).

[240] *See* HIROSHI MOTOMURA, AMERICANS IN WAITING 9 (2006) ("I have coined the term *immigration as transition*. It treats lawful immigrants as Americans in waiting, as if they would eventually become citizens of the United States, and thus confers on immigrants a *presumed equality*.").

[241] *See generally* Gulasekaram, *supra* note 12, at 894–96 & 895 nn.11–14 (listing all state gun statutes that discriminate based on alienage).

carrying); and (4) particularized restrictions on specific aspects of noncitizen possession, transport, or use.[242]

Federal criminal statutes currently forbid ownership, possession, or transport of firearms by undocumented immigrants, temporary immigrants, and former citizens who have renounced their citizenship.[243] Yet, as an immigrant crosses the legal threshold into citizenship, he or she must swear to take up arms on behalf of the nation or to perform other military or national service.[244] In addition, federal law provides an incentive for noncitizens who bear arms in defense of the nation or in prosecution of armed conflict. Under 8 U.S.C. § 1439, noncitizens serving in the armed forces earn a reduced residency requirement for naturalization.[245] The allowance for noncitizen military participation and the expedited citizenship process for military arms bearing oddly juxtaposes against the Supreme Court's ruling that states may limit state police forces to citizens.[246] Noncitizens may bear arms on behalf of the sovereignty outside the territorial United States or when they pose a danger only to other noncitizen foreigners, but they also may be prohibited from doing so inside the territorial boundary.

That these restrictions persist despite development of an equal protection framework that frowns upon alienage restrictions in the domestic arena indicates two distinct strands in American culture, both resulting in alienage distinctions. On the one hand, the continuance of these alien gun laws in nearly half the states showcases the stickiness of citizens' fear of foreigners and the desire to imbue citizenship with greater substantive content. Even as the citizenry becomes more racially diverse, and experience with immigrants increases, the endurance of a perceived nebulous threat to citizen safety from foreign sources finds life in the law.[247]

On the other hand, some of the states with alienage firearms restrictions—Illinois, Massachusetts, and New York, for example—are also those with high immigrant populations, and those with generally

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242 *Id.* at 895 nn.11–14.

243 18 U.S.C. § 922(g)(5), (7) (2006).

244 8 U.S.C. § 1448(a)(5) (2006).

245 8 U.S.C. § 1439 (2006) (authorizing naturalization through service in armed forces); *id.* § 1440 (2006) (authorizing naturalization through active-duty service during military conflicts); Exec. Order 13,269, 3 C.F.R. 241 (2003), *reprinted in* 8 U.S.C. § 1440 (2006) (designating participation in post–9/11 military activities sufficient to trigger 8 U.S.C. § 1440 exceptions to naturalization).

246 Foley v. Connelie, 435 U.S. 291, 299–300 (1978) (upholding New York law prohibiting aliens from serving as state troopers).

247 *See supra* note 208 (discussing Hawaii's Constitutional Convention).

more ameliorative policies towards immigrants.[248] Here, the noncitizen firearm restrictions are arguably more related to the public's desire in those states to legislate gun control to the greatest extent possible without creating state or federal constitutional issues than to specific antipathy towards immigrants. These states have generally comprehensive firearms schemes with significant obstacles to purchasing, selling, and possessing guns.[249]

As federal and state entities continue to prohibit minority and noncitizen gun possession and use despite changing constitutional norms, the white citizen majority continues to arm itself at high rates. In addition, gun sales regularly peak in moments where racial and immigration fears run high. For example, after 9/11, gun purchases skyrocketed amid fears that immigrants—including undocumented immigrants—presented certain security threats to the American citizenry.[250] That period also witnessed an increase in violent hate crimes against Arab and South Asian Americans, even as violent crime committed by immigrants remained relatively low.[251]

Most recently, as the election of President Barack Obama has been hailed as a breakthrough for race relations in the United States, gun sales and hate group patterns suggest a counternarrative consis-

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[248] *See, e.g.*, Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 577 (2008) ("Cities such as New York, Los Angeles, and Chicago, like other 'global cities' around the world, have a strong interest in recruiting and incorporating immigrants at both the high end and the low end of the labor market." (footnote omitted)); *see also* Pratheepan Gulasekaram, *Sub-National Immigration Regulation and the Pursuit of Cultural Cohesion*, 77 U. CIN. L. REV. 1441, 1483–86 (2009) (discussing proactive assistance provided to noncitizens in major cities).

[249] *See, e.g.*, BRADY CAMPAIGN SCORECARD, *supra* note 23 (ranking Illinois twenty-eight, Massachusetts fifty-four, and New York fifty out of one hundred points total for strength of gun laws); *Worst Gun Laws in the Worst States in the U.S.*, CHRISTIAN GUN OWNER, http://www.christiangunowner.com/worst_gun_laws.html (last viewed July 18, 2010).

[250] *Cf.* Volpp, *supra* note 181, at 1575–76 (noting ferocity of hate violence in United States after 9/11 and reinvigoration of Orientalist stereotypes to describe Middle Eastern, Muslim, and Arab Americans).

[251] *See* HUMAN RIGHTS WATCH, "WE ARE NOT THE ENEMY": HATE CRIMES AGAINST ARABS, MUSLIMS, AND THOSE PERCEIVED TO BE ARAB OR MUSLIM AFTER SEPTEMBER 11, at 13–14, 16–23 (2002), *available at* http://www.hrw.org/sites/default/files/reports/usa1102.pdf; Muneer I. Ahmad, *A Rage Shared by Law: Post–September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1262 (2004) (arguing that post–9/11 hate crimes directed at Muslim, Arab, and South Asian Americans were in part excused or characterized as crimes of passion); Rubén G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First-and-Second-Generation Young Men*, MIGRATION INFO. SOURCE (June 2006), http://www.migrationinformation.org/usfocus/display.cfm?ID=403 ("For every ethnic group without exception, the census data show an *increase* in rates of criminal incarceration among young men from the foreign-born to the US-born generations, and over time in the United States among the foreign born—exactly the opposite of what is typically assumed . . . .").

tent with historical trends in gun ownership and inferior citizenship. While the President's election is undoubtedly a watershed moment, a couple other phenomena triggered by the election also deserve notice. First, gun sales have spiked significantly since Obama became a frontrunner in the presidential election.[252] While the country remains in an economic recession, the firearms industry is experiencing record profits.[253] It should not be surprising that most of these purchases hail from the social group most opposed to gun regulation: rural white male citizens.[254] Those asked about the timing of their purchases did not attribute racial motivation to their actions but, rather, legislative ones; they purportedly worried that a President from the Democratic Party would increase gun control.[255] There is not enough evidence to determine if such fears are well founded or not. Both the Republican and Democratic parties in the late 1960s and 1970s discussed forms of gun control as part of their platforms,[256] and the only other Democratic President since then, Bill Clinton, passed the Brady Handgun bill,[257] which spurred significant firearm purchases before it went into effect.[258] Notably, the Brady Bill was first introduced during Republican administrations and endorsed by President Reagan after leaving office.[259] Current analysis suggests that gun regulation is not high on the Obama administration's agenda.[260]

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252 Kirk Johnson, *On Concerns Over Gun Control, Gun Sales Are Up*, N.Y. TIMES, Nov. 7, 2008, at A20, *available at* http://www.nytimes.com/2008/11/07/us/07guns.html.

253 *Gun Sales: Will the "Loophole" Close?*, 60 MINUTES, CBS NEWS, July 16, 2009, http://www.cbsnews.com/stories/1998/07/08/60minutes/main4931769.shtml; Andy Nelesen, *Economy Can't Slow Gun Sales*, GREEN BAY PRESS GAZETTE, July 26, 2009, at A1 ("Summer months are historically slow seasons for gun dealers, but sales this summer have remained brisk . . . .").

254 *See* Dan M. Kahan, *The Tyranny of Econometrics and Circumspection of Liberalism: Two Problems with the Gun Debate*, *in* GUNS, CRIME, AND PUNISHMENT IN AMERICA, *supra* note 2, at 44, 45–46 (describing social groups that are opposed to and in support of gun control); *see also* Zimring, *supra* note 21, at 29, 31 ("[R]ural and small town conservatives [are] anticontrol . . . .").

255 *See, e.g.*, *Gun-Control Fear Hikes Sales, Vendors Say*, PATRIOT NEWS (Harrisburg, Pa.), June 15, 2009, at A03 ("Consumers struggling to pay for fuel, food and other necessities still manage to buy guns, vendors said . . . . Many attributed this to worries that a Democrat in the White House could lead to increased gun regulation.").

256 Robert J. Spitzer, *Gun Control: Constitutional Mandate or Myth?*, *in* MORAL CONTROVERSIES IN AMERICAN POLITICS 167, 178–82 (Raymond Tatalovich & Byron W. Daynes eds., 3d ed. 2005) (discussing various presidential positions on gun control).

257 Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536 (codified at 18 U.S.C. §§ 921–922 (2006)).

258 Spitzer, *supra* note 256, at 189–93.

259 Ronald Reagen, Op-Ed., *Why I'm for the Brady Bill*, N.Y. TIMES, March 29, 1991.

260 Bob Herbert, Op-Ed., *A Threat We Can't Ignore*, N.Y. TIMES, June 20, 2009, at A19, *available at* http://www.nytimes.com/2009/06/20/opinion/20herbert.html ("There is no Obama gun ban on the way. Gun control advocates are, frankly, disappointed in the president's unwillingness to move ahead on even the mildest of gun control measures."); Ian

Perhaps more tellingly, accompanying the rise in gun purchases following Obama's election is a rise in domestic hate groups—both in terms of their membership and recent activity.[261] Directly linking notions of race, citizenship, and guns, many of their members arm themselves and are amongst those questioning Obama's citizenship qualifications for President.[262]

In short, even as the American republic matures, the tropes of gun ownership related to racial fear and xenophobia endure. As the statutes of several states attest, citizenship as a qualification for gun possession still holds sway. *Heller* affirms this distinction, purporting to protect only the right of citizens to bear arms—excluding noncitizens from the Constitution's umbrella. And as *Heller*'s reimagining of *Verdugo-Urquidez* and other recent decisions regarding fundamental rights evinces, the content of citizenship remains in flux.[263] There is nothing unnatural or perverse, as some would claim, about the exclusion of noncitizens from arms rights—but that statement is true only when contemporary exclusions are read to conform with an odious and prejudicial tradition. Fundamentally, when citizenship itself is an undetermined and malleable legal category, *Heller*'s static interpretation of "the people" rests on ever-moving—and therefore unstable—ground.

III
GUN RIGHTS AS CITIZENSHIP RIGHTS?

Despite the inability of *Heller*'s ruminations on citizens' gun rights to withstand precedential or historical scrutiny, the question persists: Can any conceptually cogent defense be proffered to resurrect a citizens-only right to bear arms? Without such a defense, the *Heller* decision seems to fall into a historical tradition where gun rights are restricted due to racist and xenophobic fears. In other words, a theoretically coherent defense of gun rights as citizenship

Urbina, *Fearing Obama Agenda, States Push To Loosen Gun Laws*, N.Y. TIMES, Feb. 24, 2010, at A1, *available at* http://www.nytimes.com/2010/02/24/us/24guns.html.

261 Holthouse, *supra* note 24, at 11–12 (chronicling increase in call to arms for militia groups and hate groups in wake of recession and election of nonwhite President); *see also* Mara Schiavocampo, *Homegrown Hate Groups Increase in Number*, MSNBC.COM, June 10, 2009, http://www.msnbc.msn.com/id/30876593/ (finding all-time high of 926 hate groups currently operating in United States).

262 *See* Holthouse, *supra* note 24, at 11–12 ("[T]he conspiracy theories that are now taking root in the movement . . . include the belief that a massive cover-up has been conducted regarding Barack Obama's birth certificate . . . .").

263 *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (upholding indefinite detention of U.S. citizen but recognizing that some process is due); Boumediene v. Bush, 128 S. Ct. 2229 (2008) (recognizing noncitizen constitutional right to challenge legality of detention under certain circumstances).

rights—a defense not proffered thus far either in *Heller* or in legal commentary—might yet salvage a restrictive reading of the Second Amendment. Comparing gun rights to other rights attached to citizenship, however, this Part argues that citizenship distinctions on firearm possession do not comport with the theories underlying other citizen-only privileges when the Second Amendment is read as a right of armed self-defense.

Here, this Article will taxonomize rights that are either already or potentially citizen-only rights to develop a theory explaining when rights are appropriately limited to the political community. Arguing that rights are properly limited to the citizenry only when public oriented or otherwise facilitative of democratic participation, Part III concludes that firearms rights, as imagined by *Heller*, do not conform to this theory unifying citizenship rights.

This unifying theory does have some traction in the First Amendment context. Namely, noncitizens' speech rights have been restricted despite having both public-oriented and private-oriented purposes.[264] However, *Heller* focuses only on the private-oriented, self-protection aspects of firearm possession. Therefore, uneven free expression guarantees to noncitizens—wherein protection for speech regarding self-government and democracy may be different for noncitizens than for citizens—cannot justify *Heller*'s potential to treat citizens and noncitizens unequally vis-à-vis firearms. In essence, the suite of theoretically defensible citizenship rights cannot include gun rights unless the Second Amendment is read as a right of armed defense of, or from, the state—a reading diametrically opposed to *Heller*'s.

The constitutionalization of armed self-defense elevates gun possession into the pantheon of other prized individual liberties such as speech, religion, and procedural rights in criminal trials.[265] Of course, simply because the Court centralizes a right does not assure its even-handed application across citizenship status. Currently, the only right that the Constitution prevents noncitizens from exercising is the right to hold federal public office.[266] In addition, state and federal provi-

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264 *See infra* note 270.

265 Levinson, *supra* note 16, at 657–59 (discussing inconsistency of legal academy's vigorous protection of certain Amendments and minimization of others).

266 U.S. CONST. art. I, § 2, cl. 2 ("No person shall be a Representative who shall not have . . . been seven Years a Citizen of the United States . . . ."); *id.* art. I, § 3, cl. 3 ("No person shall be a Senator who shall not have . . . been nine Years a Citizen of the United States . . . ."); *id.* art. II, § 1, cl. 4 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . .").

sions limiting voting[267] and jury service[268] to citizens have been upheld as consistent with—although not mandated by—the Constitution. Equal protection guarantees generally invalidate state laws that draw distinctions based on alienage, except when states are protecting a political function.[269] In addition, some speech and associations by noncitizens can result in dire consequences that would never attach to a citizen exercising his or her First Amendment rights.[270] Finally (and nontrivially) citizens maintain a right not to be deported.[271]

Below, this Article will first discuss core political rights, such as voting, public office, and jury service, before returning to the more nuanced case of speech rights. Finally, this section presents welfare rights as the sole area in which citizenship distinctions are currently tolerated, providing some support to *Heller*'s citizenship implications. However, it concludes that the normatively dubious rationale for citizen-only welfare assistance provides scant support for citizen-only firearms rights.

A few common threads unite the current suite of citizenship rights. First, voting, jury service, and public office are basic features of a system of self-governance, as each allows direct participation in the several branches of government. Second, the Court's jurisprudence similarly permits alienage distinctions in state lawmaking only when

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267 *See* 18 U.S.C. § 611 (2006) (making it unlawful for any noncitizen to vote for candidate for federal office). Arguably, the Constitution strongly suggests voting as a citizenship-related right. *See* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race . . . ."); *id.* amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged . . . ."); *id.* amend. XXIV, § 1 ("The right of citizens of the United States to vote . . . shall not be denied or abridged . . . ."); *id.* amend. XXVI ("The right of citizens of the United States . . . to vote shall not be denied or abridged . . . .").

268 28 U.S.C. §§ 1861, 1865 (2006).

269 *See, e.g.*, Ambach v. Norwick, 441 U.S. 68, 81 (1979) (upholding state alienage distinction in hiring public school teachers); Foley v. Connelie, 435 U.S. 291, 299–300 (1978) (upholding state alienage distinction in hiring state troopers); Graham v. Richardson, 403 U.S. 365, 382–83 (1971) (striking down state alienage distinction in eligibility for welfare).

270 *See* 8 U.S.C. § 1182(a)(3)(D) (2006) (declaring any immigrant "who is or has been a member of . . . [any] totalitarian party" inadmissible); *id.* § 1424 (barring citizenship based on certain advocacy); Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972) (upholding denial of entry to scholar with communist associations against claims that doing so violated First Amendment rights of citizens to hear him speak); Harisiades v. Shaughnessy, 342 U.S. 580, 591–92 (1952) (upholding against First Amendment challenges constitutionality of Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 640 (current version at 18 U.S.C. §§ 2385–2387 (2006)), which allows deportation of legal permanent residents for membership in Communist Party); Wishnie, *supra* note 76, at 668–69 (discussing whether Supreme Court's suggested limitations on noncitizen First Amendment rights is appropriate).

271 *See* 8 U.S.C. § 1227 (2006) (allowing removal of "aliens"); Lopez v. Franklin, 427 F. Supp. 345, 347 (E.D. Mich. 1977) ("It is manifest that deportation may not be imposed upon citizens born in the United States . . . .").

sovereign self-definition and self-government functions are potentially implicated.[272] Finally, the right not to be deported is at the very center of what it means to be a member of a political community recognized by the international order. International norms against the creation of stateless persons dictate that, at minimum, a sovereign must refrain from expelling its members into a protectionless purgatory.[273]

As an initial matter, the right to bear arms is unlike the right to vote, hold public office, serve on a jury, or hold government positions because firearms possession has multiple, severable purposes. In contrast to the purposes potentially attributable to the Second Amendment—self-defense, sovereign-defense, and sovereign-monitoring—voting, jury service, public office, and core governmental positions have only one primary function: to facilitate and foster participation in a system of self-government. Jury service has a checks-and-balances function as well (to discipline executive and legislative power), aligning it with the sovereign-monitoring function of firearms rights.[274] However, even this purpose of jury service is public-oriented, intended to maintain a system of self-government. So, compared with these citizenship-related rights and benefits, gun rights qua self-defense rights are dissimilar to voting, jury service, holding public office, and sovereign self-definition imperatives because none of those rights is premised on self-oriented or self-preservation rationales. The notion of armed self-defense integral to *Heller* is divorced from the self-governance protected by citizen-only rights.

A more nuanced theory accounts for citizenship-conscious free speech rights. In the First Amendment arena, the Court allows alienage distinctions for speech and association rights when noncitizens' expression potentially undercuts the republican form of government established by the Constitution; such distinctions discourage speech with a tendency fundamentally to alter the governmental system into which the noncitizen wishes to enter or remain.[275]

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272 *See supra* note 269 and accompanying text (discussing political function exception).

273 UNITED NATIONS HIGH COMM'R ON REFUGEES, STATELESSNESS: AN ANALYTICAL FRAMEWORK FOR PREVENTION, REDUCTION, AND PROTECTION, at v (2008), *available at* http://unhcr.org.ua/files/mf30_e.pdf ("International legal standards recommend the adoption of safeguards . . . in order to prevent statelessness from occurring, either at birth or later in life. Human rights treaties contain a number of safeguards but the most comprehensive set of standards . . . [is] the 1961 Convention on the Reduction of Statelessness.").

274 As Professor Steve Higginson helpfully noted, jury service also performs a checks and balances function, allowing the citizenry to directly curtail executive overreaching. While I agree that this is different from self-governance, it is still a democracy-enhancing, public-oriented function.

275 8 U.S.C. § 1424 (2006) (prohibiting naturalization of noncitizens associated with totalitarian regimes or Communist Party, or those advocating violent overthrow of government).

Undoubtedly, the fact that the background doctrinal framework for the First Amendment permits citizenship distinctions complicates a unified theory of citizen-only rights. However, *Heller*'s constitutional enshrining of a right of armed self-defense does not allow for importation of the variegated First Amendment framework for noncitizens.

The public good at stake in the First Amendment contrasts with the private interests highlighted by the Court's analysis in *Heller*. The first clause of the Second Amendment directly posits a public-directed rationale for gun rights. Arguably then, the right to bear arms, like the right to free speech, must apply unevenly to noncitizens if their gun possession undermines national preservation. But in this analogy between the Second Amendment and other constitutional guarantees, alienage distinctions in gun laws make sense only when the right to bear arms is understood to have a public or civic purpose. In other words, noncitizens are rightly excluded from Second Amendment protections only when the Amendment's first clause is read as a limitation on the second, protecting gun possession in a public or civic-minded capacity, the exact reading rejected by *Heller*.[276]

If the Second Amendment were read to exclude noncitizens only when those noncitizens use or possess firearms in a political sense against state or federal governments or when noncitizens use them to defend the state or federal government, the right to bear arms might comport with the selective alienage restrictions on the rights to free expression. *Heller*'s narrowing of the Second Amendment's reach, however, condones blanket exclusions of citizen gun ownership regardless of rationale or purpose. The federal government has not excluded noncitizens from state-related firearm use; to the contrary, it expressly allows—indeed incentivizes—noncitizens' military participation and use of arms in that capacity. In addition, the political-function exception to heightened equal protection inquiry for state alienage restrictions directly supports the political reading of the Second Amendment rejected in *Heller*.[277] In the state arena, noncitizens may be prohibited from becoming state troopers precisely because the job entails the potential for coercive and state-sanctioned use of force over citizens and other residents for public-oriented ends.

The dilemma caused by the two prevailing purposes of the Second Amendment—sovereign-related defense and self-defense—is in stark tension with only noncitizen dispossession. For citizens, the

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[276] District of Columbia v. Heller, 128 S. Ct. 2783, 2791 (2008) ("Reading the Second Amendment as protecting only the right to 'keep and bear arms' in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as 'the people.'").

[277] *See supra* note 269 and accompanying text (discussing political function exception).

two purposes can coexist comfortably. Citizens as persons may require self-defense, and citizens as citizens may be required to defend their sovereignty from internal and external threats to their freedom. For noncitizens, however, the purposes can be at odds. In moments of internal and external threat to national security, deprivation of noncitizen gun rights may advance public-oriented, national preservation goals, similar to curtailment of certain speech threatening our republican order. Doing so, however, undermines the self-oriented notions underlying *Heller*'s vision of gun usage. If the Second Amendment is truly about self-defense, and self-defense is fundamental, then it is incongruous to limit entire classes of persons to whom it applies.[278] Presumably, in light of the historical disarmament presented in Part II and contemporary events, noncitizens require self-defense just as much, if not more, than citizens.[279] Even in recent years, the number of incidents of violent hate crimes against foreigners and perceived foreigners has increased dramatically.[280]

Perhaps a better comparison for the current state of gun rights, and *Heller*'s citizenship implications, is the current state of welfare rights for noncitizens. These rights are generally governed by equal protection jurisprudence unless preemption and supremacy principles arise. Previously, under the rule of *Graham v. Richardson*, state alienage distinctions in public benefit provisions were struck down as equal protection violations.[281] More recently, however, some states—with the blessing of post-*Graham* federal legislation[282]—have limited certain welfare and public assistance benefits to citizens.[283] While limitations in social service provisions might coincide with the other citi-

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[278] *See* United States v. McCane, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) (questioning *Heller*'s ad hoc exclusion of certain classes of persons, including former felons).

[279] *Cf.* Cottrol & Diamond, *supra* note 17, at 359–60 (1991) ("[T]he right [to bear arms] may have had greater and different significance for blacks and others less able to rely on the government's protection . . . .").

[280] *See supra* notes 250–51 and accompanying text (discussing increase in violence against Arab and south Asian Americans after 9/11); *see also, e.g.*, S. POVERTY LAW CTR., CLIMATE OF FEAR: LATINO IMMIGRANTS IN SUFFOLK COUNTY 5 (2009), http://www.splcenter.org/sites/default/files/downloads/splc_suffolk_report_0.pdf (noting 40% rise in hate crimes directed at Latinos between 2003 and 2007).

[281] 403 U.S. 365, 376 (1971). I should note here, however, that *Graham* may also be understood as a preemption and Supremacy Clause case, as the Court based part of its holding on federal exclusivity principles.

[282] 8 U.S.C. § 1624 (2006) (purporting to devolve decisions regarding limiting beneficiaries of public assistance to states and to allow states to maintain alienage distinctions in welfare).

[283] For example, the Tenth Circuit Court of Appeals upheld Colorado's decision to rescind healthcare benefits to several classes of noncitizens. Soskin v. Reinertson, 353 F.3d 1242, 1265 (10th Cir. 2004).

zenship rights if the economic community of the United States was also restricted to citizens, our current system allows for employment of noncitizens and collects tax payments from noncitizens—including undocumented persons.[284] Moreover, as an empirical matter relevant to policy concerns, noncitizens consume far less in social services than do citizens.[285] Thus, alienage distinction in welfare benefits are practically difficult to justify. In addition, because of the disjunction between welfare benefits and self-government prerogatives, alienage distinctions in welfare benefits are theoretically difficult to justify. Thus it should come as no surprise that citizenship classifications in public assistance laws vary across states and are currently in constitutional turmoil.[286]

Similarly, state alien gun laws are varied and in constitutional turmoil. Just as the incongruity between the economic community and political community complicate alienage restrictions in public assistance, incongruity between those potentially requiring self-defense ability and the political community undermines alienage restrictions in gun law. Like welfare rights, armed self-defense is unrelated to self-governance and thus should be analyzed under equal protection and structural norms. State alienage distinctions are also like welfare rights insofar as gun rights yield no cohesive theory of when and why firearms should be limited to only citizens.[287]

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[284] *See generally* IMMIGRATION POLICY CTR., ASSESSING THE ECONOMIC IMPACT OF IMMIGRATION AT THE STATE AND LOCAL LEVEL (2010), http://www.immigrationpolicy.org/sites/default/files/docs/State_and_Local_Study_Survey_041310_1.pdf (discussing economic impact of immigrants).

[285] Peter J. Cunningham, *What Accounts for Differences in the Use of Hospital Emergency Departments Across U.S. Communities?*, 25 HEALTH AFFAIRS w324, w324 (2006); Alexander N. Ortega et al., *Health Care Access, Use of Services, and Experiences Among Undocumented Mexicans and Other Latinos*, 167 ARCHIVES OF INTERNAL MED. 2354, 2354 (2007), *available at* http://www.cha.wa.gov/?q=files/HealthCareAccessAmongUndocumentedMexicansandotherLatinos.pdf.

[286] *See, e.g.*, *Reinertson*, 353 F.3d at 1265 (upholding Colorado statute denying certain healthcare assistance to several classes of noncitizens); Aliessa *ex rel.* Fayad v. Novello, 754 N.E.2d 1085, 1088 (N.Y. 2001) (striking down law denying state healthcare benefits based on alienage).

[287] Sixteen state constitutions, like the U.S. Constitution, use "the people" to describe right-holders. *See* Eugene Volokh, *The Right To Keep and Bear Arms as Provided for in State Constitutions*, *in* DAVID B. KOPEL ET AL., SUPREME COURT GUN CASES: TWO CENTURIES OF GUN RIGHTS REVEALED 29, 29–35 (2004). These states are Alabama, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Massachusetts, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Utah, Vermont, and Virginia. *Id.*; *see* Gulasekaram, *supra* note 12, at 922 & nn.156–58 (listing states that use "the people," "citizens," "persons," and other designations in their state constitutions). Nine of those states maintain some form of alienage restriction in their gun laws. Gulasekaram, *supra* note 12, at 895 nn.11–14. Eighteen states use the specific term "citizen" in their right-to-bear-arms provisions: Arizona, Alaska, Connecticut, Illinois, Louisiana, Maine, Mississippi, Missouri, Nevada, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas,

Thus, the puzzle of *Heller*'s citizenship talk comes full circle. Textually, structurally, and in light of *Verdugo-Urquidez*, the right to bear arms cannot inure to only "citizens" unless the Second Amendment's protections are conditioned on obligations to the state. But the individual rights perspective supported by *Heller* rejects an interpretation constraining the Second Amendment to the state-oriented prefatory clause. On the other hand, if the Amendment is neither shackled to state defense nor to arms bearing in a military-related sense but is instead animated by concerns over armed self-protection, then robbing the most vulnerable in our society of that right makes little sense.[288]

In sum, the legacy of noncitizen gun regulation suggests a pattern based not in sovereignty-related interpretations of the Second Amendment, but rather fears of foreigners and racial minorities presenting threats to prevailing majorities. Against this history, grounding the Second Amendment in a personal self-defense imperative precludes logical justification for limiting firearms rights to citizens.

GUNS AND CITIZENS: A CONCLUSION

The paradox of inclusion and exclusion highlighted by this Article lies at the heart of citizenship distinctions in firearms regulations. Since the republic's founding, when gun rights were congruent to core political rights available to only white, propertied, first-class citizens, the associative progression of gun rights and citizenship caused a significant enlargement in the pool of eligible gun owners through the nineteenth century. Yet, when the fundamental nature of citizenship changed in the late nineteenth century to include previously excluded

Washington, and Wyoming. *Id.* at 922. Yet, only nine of those states maintain statutory alienage distinctions for gun possession or use. *Id.* at 895 nn.11–14. The remaining states that maintain alienage distinctions for arms bearing frame the right as one held by "persons" or "all men," or have no arms-related constitutional provisions. *Id.* at 922.

288 *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 242 (1896) (Field, J., concurring in part and dissenting in part) (declaring that noncitizens are covered by Due Process Clause and must be accorded Fifth and Sixth Amendment rights); People v. Nakamura, 62 P.2d 246, 247 (Colo. 1936) (striking down alienage restriction in gun laws because it deprived alien of right to defend self and property); People v. Zerillo, 189 N.W. 927, 928 (Mich. 1922) ("[A] constitution like ours[ ] grant[s] to aliens who are bona fide residents of the state the same rights . . . as native-born citizens, and to *every person* the right to bear arms for the defense of himself and the state . . . ."); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1060–61 & nn.42–43 (1994) (arguing that noncitizens, including undocumented immigrants, are entitled to Fourth, Fifth, Sixth, and Eighth Amendment protections in criminal proceedings, at a minimum). *But see* Wishnie, *supra* note 76, at 669, 747 (noting, but then justifying through his theory of "extraordinary speech," First Amendment's varied protection of different classes of noncitizens).

races and immigrant groups, expansion of gun rights stalled. Into the twentieth century, legislative and judicial efforts, mostly agnostic about interpretations of "the people" in the Amendment, reaffirmed latent societal fears regarding the nationality and color of those permitted to possess guns. Even as constitutional scrutiny of citizenship distinctions generally grew more strict, the white majority continued a pattern of de facto disarmament of minorities and created a complex web of firearms restrictions for noncitizens. This historical analysis shows the continued tensions in the American psyche among community, citizenship, and belonging.

This Article also examined *Heller*'s focus on individual rights and self-defense, as well as its narrowing of the conception of "the people" in the Second Amendment. Taking *Heller*'s meaning and import at face value, the holding would seem to expand gun rights by limiting extreme state regulation, while simultaneously contracting the universe of those who may own guns and claim the Second Amendment's protections. Unsurprisingly then, the post-*Heller* world of gun regulation continues and augments the historical tension between gun rights and citizenship.

As such, *Heller*'s citizenship talk requires considerable reconsideration and revision. As a right of personal self-defense, gun ownership is connected to citizenship status tangentially at best unless noncitizens present the primary source of armed danger within the country. This, however, has not been the case since the early days of the republic, when threats from British loyalists, noncitizen Native Americans, and slave insurrections occupied the attention of the citizen majority. These same nebulous fears of danger to the citizen population from armed foreigners motivated prosecution of recently immigrated German laborers training for their defense, spurred various state alien-in-possession laws at the beginning of the twentieth century, animated debates over Hawaii's then-nascent right-to-bear-arms provision during the state's Constitutional Convention in the 1950s, and still galvanizes arms purchases in present day.[289] But now, as was the case then, no empirical data linking specific threats to citizens from noncitizen possession have ever been proffered to substantiate these fears. Indeed, the description of key moments in the narrative of alien gun laws in Part II of this Article highlights the hyperbolized and stereotypical conceptions of noncitizen and nonwhite aggression animating regulation of noncitizen possession. Of course, one of the ironies of citizens' concerns about noncitizen firearm possession is that personal gun ownership and the use of fire-

[289] *See supra* Part II (discussing racial and xenophobic contours of gun regulation).

arms for private ends is a uniquely American ethos, anathema to most immigrants.[290]

If noncitizens are not a unique violent threat to the citizenry, then firearms regulations of noncitizens are justifiable only when citizens' arms possession accompanies concomitant arms-related duties and obligations to the state or to state watchdog militias. But neither *Heller* nor contemporary gun advocates recommend conditioning gun ownership on public-oriented duties. If anything, the absence of required military service for citizens, combined with federal laws allowing for—in fact, incentivizing—noncitizen military service, evince a specific desire to expand public-oriented, state-protective gun ownership beyond citizens. Those attempting to possess guns as a safeguard against governmental tyranny—the so-called modern militia movement—are a minority fringe, often too tainted with racial or religious prejudice or xenophobic fervor to be treated as legitimate citizen endeavors tasked with guarding against state tyranny.[291] Moreover, immigration law requires that those wishing to become citizens express their political beliefs through nonviolent and orderly expressions.[292]

Stripped of these justifications, state or federal firearms restrictions on noncitizens appear grounded only in irrational and unsupportable fears about foreigners or a desire to make citizenship more valuable for its own sake. Linking gun rights with other citizenship rights imbues citizenship with greater substantive value, constructing it as the legal category triggering the rights of both self-rule and self-defense. But unlike with other citizenship rights, the limitation of the right to armed self-defense finds no independent support or rationale save a desire to keep instruments of deadly violence as a privilege of citizenship and a survival advantage for citizens.

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290 Arie Bauer et al., *A Comparison of Firearms-Related Legislation on Four Continents*, 22 MED. & L. 105, 107 (2003) ("The acquisition of firearms by private individuals in the USA is easier than in most other western countries."); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI-KENT L. REV. 291, 330 (2001) (noting that no constitutions written since fall of communism contain right-to-bear-arms provisions).

291 *See* Holthouse, *supra* note 24, at 11–12 (discussing increasing credence given by militia groups to "fringe conspiracy theories"); *see also* Jesse McKinley & Malia Wollan, *New Border Fear: Violence by a Rogue Militia*, N.Y. TIMES, Jun. 27, 2009, at A9, *available at* http://www.nytimes.com/2009/06/27/us/27arizona.html ("[Minutemen patrols at the U.S.-Mexico border] initially drew praise from some political leaders, including Gov. Arnold Schwarzenegger of California, but also raised concerns that the activities were thin veils for racism and xenophobia.").

292 8 U.S.C. § 1424(a) (2006) (barring naturalization of those associated with or advocating overthrow of government by force); *id.* § 1427(a)(3) (requiring "attach[ment] to the principles of the Constitution" and "good moral character").

Thus, the irony of noncitizen exclusion from gun rights enabled by *Heller* is that it irreparably undermines the opinion's watershed interpretation of the Second Amendment. Our legal and political regime simply cannot bear the significance of the right to bear arms and the meaning of "the people," when one is read expansively and the other interpreted jealously. In light of history, text, and logic, "the people" of the Second Amendment must include more than citizens. Indeed, devoid of ad hoc—and ultimately unjustifiable—exceptions, "the people" may comprehend several classes of persons. Nonviolent felons[293] and even undocumented persons can present colorable claims to exercise the right of reasonable armed self-defense.

"The people" in the Second Amendment, as it does elsewhere in the Federal Constitution, resists easy mapping onto the terrain of citizenship and noncitizenship. One possibility is that the phrase is akin to "nation" in that it refers to a nebulous concept based in shared meaning and aspiration. Like "nation," it does not itself provide bright-line limitations on who might be included within that aspiration, allowing for expansion and contraction as the republic evolves. Or, as Justice Kennedy suggested, "the people" might refer to the importance of a right, as opposed to the class it delimits.[294] Both fail to explain how or why the Second Amendment mandates limitations of its guarantees to citizens. The preceding analysis illuminates the profound implications of Justice Scalia's description of those to whom the right to bear arms inures. More importantly, it exposes the interpretative and doctrinal difficulties with limiting "the people" of the Federal Constitution to citizens.

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[293] *See* United States v. McCane, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) ("Non-violent felons, for example, certainly have the same right to self-defense in their homes as non-felons.").

[294] *See supra* note 77–79 and accompanying text (discussing Justice Kennedy's concurrence in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)).